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Request from the Governments of Belgium, Costa Rica, Finland, Hungary, the Republic of Korea, South Africa and the Permanent Observer Mission of Switzerland to the United Nations regarding the text prepared by the International Committee of the Red Cross on article 8, paragraph 2 (b), (i), (ii), (iii), (iv), (v), (vi), (vii), (ix), (xi) and (xii), of the Statute

Note verbale dated 21 July 1999 from the Permanent Missions of Belgium, Costa Rica, Finland, Hungary, the Republic of Korea, South Africa and the Permanent Observer Mission of Switzerland to the United Nations addressed to the Secretary-General

The Permanent Missions of Belgium, Costa Rica, Finland, the Republic of Hungary, the Republic of Korea, the Republic of South Africa and the Permanent Observer Mission of Switzerland to the United Nations have the honour to attach the text of the paper prepared by the International Committee of the Red Cross (see annex) in order to assist the Preparatory Commission in elaborating the text on the elements of crimes for the Court. The material in the paper relates to the crimes listed in article 8, paragraph 2 (b) (i), (ii), (iii), (iv), (v), (vi), (vii), (ix), (xi) and (xii), of the Statute.

The Permanent Missions of Belgium, Costa Rica, Finland, the Republic of Hungary, the Republic of Korea, the Republic of South Africa and the Permanent Observer Mission of Switzerland to the United Nations request the circulation of the present letter and its annex as a document of the Preparatory Commission.

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Annex

Paper prepared by the International Committee of the Red Cross relating to the crimes listed in article 8, paragraph 2 (b) (i), (ii), (iii), (iv), (v), (vi), (vii), (ix), (xi) and (xii), of the Statute of the International Criminal Court

Contents

	Page
Introduction	6
Abbreviations	7
Article 8 Paragraph 2 (b) ICC Statute - OTHER SERIOUS VIOLATIONS OF THE LAWS AND CUSTOMS APPLICABLE IN INTERNATIONAL ARMED CONFLICT -	9
General points common to the offences under Article 8 (2) (b) of the ICC Statute	9
Commentary	9
Comments on specific offences	9
General remarks relevant to all offences	9
Art. 8 (2) (b) (i) - Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities	9
1. Results from the sources	9
2. Commentary	10
a) Treaty reference of the war crime	10
b) Legal basis	10
aa) Remarks concerning the material element	10
(1) General remarks	11
(2) Attack	11
(3) Civilian Population/Civilian	11
(4) Prohibition of the use of indiscriminate weapons	13
(5) The requirement to take precautions with a view to sparing civilians	14
(6) Reprisals against the civilian population as such, or individual civilians	16
bb) Remarks concerning the mental element	18
Art. 8 (2) (b) (ii) - Intentionally directing attacks against civilian objects, that is, objects which are not military objectives	19
1. Results from the sources	19
2. Commentary	19
a) Treaty reference of the war crime	19
b) Legal basis	19

aa) Remarks concerning the material element 19
(1) General remarks 19
(2) Attack 20
(3) Civilian Objects 20
bb) Remarks concerning the mental element 20

Art. 8 (2) (b) (iii) - Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict 21

1. Results from the sources 21
2. Commentary 21
a) Treaty reference of the war crime 21
aa) Peacekeeping missions 22
bb) Humanitarian assistance missions 22
b) Legal basis 23
aa) Remarks concerning the material element 23
(1) Attack 23
(2) Humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations 23
(a) Peacekeeping missions 23
(b) Humanitarian assistance missions 25
(3) As long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict 25
(a) General Remarks 25
(b) Peacekeeping missions 26
(c) Humanitarian assistance missions 26
bb) Remarks concerning the mental element 27

Art. 8 (2) (b) (iv) - Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated 27

1. Results from the sources 27
2. Commentary 27
a) Treaty reference of the war crime 27
b) Legal basis 29
aa) Remarks concerning the material element 29

(1) Attack 29
(2) Incidental loss of life or injury to civilians [...] which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated 29
(3) Widespread, long-term and severe damage to the natural environment 32
bb) Remarks concerning the mental element 34

Art. 8 (2) (b) (v) - Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives 34

1. Results from the sources 34
2. Commentary 35
a) Treaty reference of the war crime 35
b) Legal basis 35
aa) Remarks concerning the material element 35
(1) Attack 35
(2) By whatever means 35
(3) Non-defended Locality 36
(4) Military objective 39
bb) Remarks concerning the mental element 39

Art. 8 (2) (b) (vi) - Killing or wounding a combatant who, having laid down his arms or having no longer means of defence, has surrendered at discretion 40

1. Results from the sources 40
2. Commentary 40
a) Treaty reference of the war crime 40
b) Legal basis 40
aa) Remarks concerning the material element 41
bb) Remarks concerning the mental element 46

Art. 8 (2) (b) (vii) - Making improper use of a flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury 47

1. Results from the sources 47
2. Commentary 47
a) Treaty reference of the war crime 47
b) Legal basis 48
aa) Remarks concerning the material element 48
(1) Improper use of a flag of truce 49
(2) Improper use of the flag or of the military insignia and uniform of the enemy 50

(3) Improper use of the flag or of the military insignia and uniform of the United Nations 54
(4) Improper use of the distinctive emblems of the Geneva Conventions 55
bb) Remarks concerning the mental element 57

Art. 8 (2) (b) (ix) - Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives 57

1. Results from the sources 57
2. Commentary 57
a) Treaty reference of the war crime 57
b) Legal basis 57
aa) Remarks concerning the material element 58
(1) Attack 58
(2) Buildings dedicated to religion, education, art, science or charitable purposes, historic monuments 58
(3) Hospitals and places where the sick and wounded are collected 62
(4) Loss of protection 66
bb) Remarks concerning the mental element 67

Art. 8 (2) (b) (xi) - Killing or wounding treacherously individuals belonging to the hostile nation or army 67

1. Results from the sources 67
2. Commentary 67
a) Treaty reference of the war crime 67
b) Legal basis 68
aa) Remarks concerning the material element 68
bb) Remarks concerning the mental element 71

Art. 8 (2) (b) (xii) - Declaring that no quarter will be given 72

1. Results from the sources 72
2. Commentary 72
a) Treaty reference of the war crime 72
b) Legal basis 72
aa) Remarks concerning the material element 72
bb) Remarks concerning the mental element 73

INTRODUCTION

It was agreed during the Diplomatic Conference on the Establishment of an International Criminal Court, held in Rome from 15 June to 17 July 1998, that a draft text on the elements of the crime of genocide, crimes against humanity and war crimes was to be prepared by the Preparatory Commission. In this respect, Article 9 of the Statute of the International Criminal Court (the "ICC Statute") states that the *"[e]lements of crimes shall assist the Court in the interpretation and application of Articles 6, 7, and 8. They shall be adopted by [...] the members of the Assembly of States Parties"*. This paper is intended to assist the Preparatory Commission in preparing the text on the elements of crime for Article 8 (2) solely by presenting relevant sources and indicating the results that emerge from these sources. It does not reflect any decision taken at a previous session of the Preparatory Commission. Part V deals exclusively with specific war crimes as listed in Article 8 (2) (b) of the ICC Statute.

The review of sources consisted in an exhaustive research and analysis of the relevant case law and international humanitarian law and human rights law instruments. As regards case law, a review of cases from the Leipzig Trials, from post Second World War trials, including the Nuremberg and Tokyo trials as well as national case law, and decisions from the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda was done. National case law on war crimes was examined when it was available in English, French or German. Decisions from international and regional Human Rights bodies were also analysed for further clarification on certain offences. It is important to note that the various sources referred to in this paper were selected solely in an objective manner and based on their relevance and shall not be seen as a reflection of any particular view or position. In contrast to the previous parts of the study, the ICRC had to rely to a greater degree on legal writings and views expressed in military manuals, since the conduct of hostilities, dealt with in the crimes analysed in this part of the study, so far has only rarely been the subject of international or national case law.

The paper is structured in the following manner. First, the results from the sources are outlined for each offence listed under Article 8 (2) (b) of the Statute. The term "material element" is used to describe the *actus reus* of the offence (the act or omission) and "mental element" to describe the *mens rea* or necessary intent to commit the offence. Second, a commentary containing an analysis of the various sources under review shows the legal basis for the results indicated.

It is important to note that this paper does not deal with the responsibilities of commanders, superiors and subordinates (Art. 28 ICC Statute) nor questions concerning crimes committed by incitement, attempt, conspiracy or other forms of assistance (Art. 25 ICC Statute).

ABBREVIATIONS

The following abbreviations are used throughout this paper:

ACHPR:	African Charter on Human and Peoples' Rights
A.D.:	Annual Digest and Reports of Public International Law Cases
AP I:	Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) of 8 June 1977
AP II:	Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) of 8 June 1977
ICCPR:	International Covenant on Civil and Political Rights
ECHR:	European Court of Human Rights
GAOR:	General Assembly Official Records
GC:	Refers to all four (4) Geneva Conventions
GC I:	Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949
GC II:	Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949
GC III:	Geneva Convention Relative to the Treatment of Prisoners of War of 12 August 1949
GC IV:	Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 12 August 1949
IACHR:	Inter-American Commission (or Court) on Human Rights
IAYHR:	Inter-American Yearbook on Human Rights
ICC:	International Criminal Court
ICTR:	International Criminal Tribunal for Rwanda
ICTY:	International Criminal Tribunal for the former Yugoslavia

ILM:	International Legal Materials
ILR:	International Law Reports
UN Doc.:	United Nations Document
UNGA Res.:	United Nations General Assembly Resolution
WCC:	War Crimes Commission

Article 8 Paragraph 2 (b) ICC Statute
- OTHER SERIOUS VIOLATIONS OF THE LAWS AND CUSTOMS APPLICABLE IN INTERNATIONAL ARMED CONFLICT -

General points common to the offences under Article 8 (2) (b) of the ICC Statute

(1) The conduct is committed in the context of an international armed conflict.

For the Commentary see Part III of the ICRC Study dealing with other crimes under Art. 8 (2) (b) of the Statute.

Comments on specific offences

General remarks relevant to all offences

- With respect to the terms "unlawful" or "lawful", as used in the elements of several offences, it is important to emphasise that they refer to the lawfulness under international law. This was repeatedly stated in various post Second World War Trials (*"contrary to the laws and usages of war"*) as has been shown in Part I of this study.
- The notion "wilful" includes "intent" and "recklessness", but excludes ordinary negligence. The term "knowingly" must be understood in the sense of Art. 30 ICC Statute which defines "knowledge" as meaning awareness that a factual circumstance exists or a consequence will occur in the ordinary course of events (cf. Art. 30 (3)).

Art. 8 (2) (b) (i) - Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities

1. Results from the sources

Material elements

(1) The perpetrator directed the attack against the civilian population or individual civilians, not directly taking part in hostilities.

Mental element

(2) The perpetrator knew or should have known the factual circumstances that established the civilian status of the population or individual persons attacked;
(3) The perpetrator acted wilfully.

2. Commentary

a) Treaty reference of the war crime

The terms "Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities" are to large extent derived from Art. 51 (2) AP I (*"The civilian population as such, as well as individual civilians, shall not be the object of attack."*) and Art. 85 (3) (a) AP I (*"the following acts shall be regarded as grave breaches of this Protocol, when committed wilfully, in violation of the relevant provisions of this Protocol, and causing death or serious injury to body or health: (a) making the civilian population or individual civilians the object of attack."*). In contrast to the latter provision, the offence as defined in the Statute does not make reference to a specific result, e.g. death or serious injury to body or health. Since this result requirement has been explicitly added elsewhere in the Statute, namely in Art. 8 (2) (b) (vii) (*"Making improper use of a flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions, **resulting in death or serious personal injury***", emphasis added), one might conclude that, compared to the grave breach provision, a lower threshold was chosen on purpose in order to emphasise that Art. 8 (2) (b) (i) of the Statute is primarily based on Art. 51 (2) AP I. This reflects the fact that not all war crimes are grave breaches.[1]

b) Legal basis

Neither the ICTY nor the ICTR has rendered any decision on this war crime to date. However, certain other sources may be helpful in interpreting various elements of this offence.

aa) Remarks concerning the material element

The following conclusions may be drawn from the various sources examined below:

This offence is not limited to attacks against individualized civilians. It essentially encompasses attacks that are not directed against a specific military objective or combatants or attacks employing indiscriminate weapons or attacks effectuated without taking necessary precautions to spare the civilian population or individual civilians, especially *failing to seek precise information* on the objects or persons to be attacked.

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[1] Although under customary international law all war crimes are subject to permissive universal jurisdiction, the GC introduced compulsory universal jurisdiction for particularly serious war crimes, referred to as "grave breaches".

(1) General remarks

The ICTY Prosecution defined the material elements of ("Unlawful attacks on civilians") as follows:

- An attack resulted in civilian deaths, serious injury to civilians, or a combination thereof;
- The attack was [...] directed at the civilian population or individual civilians[2]

In a proceeding under Rule 61 of the ICTY Rules of Procedure the ICTY Trial Chamber confirmed the indictment in the *Martic case*.[3] The Chamber held the prohibition on attacking civilians was clearly stated in Arts. 51 (2) and 85 (3) (a) AP I in relation to international armed conflicts and in Art. 13 (2) AP II in relation to non-international armed conflicts.[4]

(2) Attack

The term attack is defined in Art. 49 (1) AP I and *"means acts of violence against the adversary, whether in offence or in defence"*.

The notion of attack as defined in this provision refers to the use of armed force to carry out a military operation during the course of an armed conflict. Questions relating to the responsibility for unleashing the conflict are of a completely different nature. Therefore, the terms "offence" and "defence" must be understood independently from the meaning attributed to them by the law regulating the recourse to force under the UN Charter, in particular, they are unrelated to the concept of aggression or the first use of armed force.

(3) Civilian Population/Civilian

According to Art. 50 AP I

> *"1. A civilian is any person who does not belong to one of the categories of persons referred to in Article 4 (A) (1), (2), (3) and (6) of the Third Convention and in Article 43 of this Protocol. In case of doubt whether a person is a civilian, that person shall be considered to be a civilian.*
> *2. The civilian population comprises all persons who are civilians.*
> *3. The presence within the civilian population of individuals who do not come within the definition of civilians does not deprive the population of its civilian character."*

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[2] ICTY, The Prosecutor's Pre-trial Brief, *The Prosecutor v. Dario Kordic and Mario Cerkez*, IT-95-14/2-PT, p. 48.

[3] ICTY, *The Prosecutor v. Milan Martic*, IT-95-11-R61, ILR Vol. 108, p. 41. Count III of the indictment (para. 17) states that *"[o]n 3 May 1995, MILAN MARTIC, as president of the self-proclaimed RSK, knowingly and wilfully ordered an unlawful attack against the civilian population and individual civilians of Zagreb causing at least two deaths and numerous injuries to the civilian population and individual civilians of Zagreb, and in doing so, MILAN MARTIC violated the laws and customs governing the conduct of war, a crime recognised by Articles 3 and 7 (1) of the Tribunal Statute"*.

[4] ICTY, *The Prosecutor v. Milan Martic*, IT-95-11-R61, ILR Vol. 108, para. 8, p. 44. See also ICTY, *The Prosecutor v. Ivica Rajic*, IT-95-12-R61, ILR 108, para. 48, pp. 162 *et seq.*

However, as it follows from Art. 51 (3) AP I, civilians are only protected against attacks unless and for such time as they do not take a direct part in hostilities.

In the context of common Art. 3 GC and the respective provisions of AP II the ICTR found that **the term "direct part in hostilities" has evolved from the notion "active part in the hostilities"** of common Art. 3. The Tribunal concluded in this respect:

> ***"These phrases** are so similar that, for the Chamber's purposes, they **may be treated as synonymous**."*[5]

N.B.: In this regard the U.S. Military Manual states:

> *"Civilian immunity requires a corollary obligation on the part of the civilians not to take a direct part in hostilities. This very strict condition means they must not become combatants. For example, taking a direct part in hostilities covers acts of war intended by their nature and purpose to strike at enemy personnel and material. Thus a civilian taking part in fighting, whether singly or as a member of a group, loses the immunity given civilians."*[6]

See also in this context Art. 79 - Measures or protection for journalists:

> *"1. Journalists engaged in dangerous professional missions in areas of armed conflict shall be considered as civilians within the meaning of Article 50, paragraph 1.*
> *2. They shall be protected as such under the Conventions and this Protocol, provided that they take no action adversely affecting their status as civilians, and without prejudice to the right of war correspondents accredited to the armed forces to the status provided for in Article 4 (A) (4) of the Third Convention. [...]"*

With respect to the notions of "civilian population as such" and "individual civilians" the following finding of a U.S. Military Tribunal in the *Ohlendorf case (Einsatzgruppen Trial)* after the Second World War is of help:

> *"A city is bombed for tactical purposes: communications are to be destroyed, railroads wrecked, ammunition plants demolished, factories razed, all for the purpose of impeding the military. In these operations, it inevitably happens that non-military persons are killed. This is an incident, a grave incident to be sure, but an unavoidable corollary of hostile battle action. The civilians are not individualised. The bomb falls, it is aimed at the railroad yards, houses along the tracks are hit and many of their occupants killed. But that is entirely different, both in fact and in law, from an armed force marching up to these same railroad tracks, entering those houses abutting thereon, dragging out the men, women and children and shooting them."*[7]

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5 ICTR, *The Prosecutor v. Jean Paul Akayesu*, ICTR-96-4-T, para. 629 (emphasis added).

6 Department of the Air Force, AF Pamphlet 110-31, International Law - The Conduct of Armed Conflict and Air Operations, 1976, p. 5-8.

7 Cited in: UN War Crimes Commission, Law Reports of Trials of War Criminals, vol. XV, p. 111.

The judgement reflects the present law in so far as it indicates that the prohibition of attacks against the civilian population or civilians does not prohibit civilian casualties in an absolute manner. Attacks aimed at military objectives (objects and combatants)[1] may cause collateral civilian damage. This collateral damage is not unlawful if the conditions of the rule of proportionality as expressed in Art. 51 (5) (b) AP I are respected. Attacks that affect the civilian population are also not unlawful as long as they are not indiscriminate in nature.

Situations, in which civilians are to be found in the vicinity of military objectives, are nowadays specifically addressed in Art. 51 (4) and (5) AP I:

> *"4. Indiscriminate attacks are prohibited. Indiscriminate attacks are:*
> *(a) those which are not directed at a specific military objective;*
> *(b) those which employ a method [...] of combat which cannot be directed at a specific military objective; or*
> *(c) those which employ a method [...] of combat the effects of which cannot be limited as required by this Protocol;*
> *and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction.*
> *5. Among others, the following types of attacks are to be considered as indiscriminate:*
> *(a) an attack by bombardment by any methods or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects;*
> *and*
> *(b) an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated."*

The first example in Para. 5 allows to treat several military objectives in a populated area as one military objective if the objectives are not clearly separated or distinct.

The second example in Para. 5 allows attacks against military objectives if the attack may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would not be excessive in relation to the concrete and direct military advantage anticipated.

These attacks may not be considered as attacks against the civilian population as such or against individual civilians, even if civilian casualties occur.

(4) Prohibition of the use of indiscriminate weapons

The ICJ in its advisory opinion on the legality of the threat or use of nuclear weapons held:

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[1] As will be shown below, it can hardly be said that an attack effected without taking the necessary precautionary measure to spare the civilian population or individual civilians constitutes an attack aimed at a military objective.

"The cardinal principles contained in the texts constituting the fabric of humanitarian law are the following. The first is aimed at the protection of the civilian population and civilian objects and establishes the distinction between combatants and non-combatants; States must never make civilians the object of attack and must consequently never use weapons that are incapable of distinguishing between civilian and military targets."[9]

The Court thus equated the use of indiscriminate weapons with a deliberate attack on civilians. The only existing treaty definition of an "indiscriminate weapon" may be seen in Art. 51 (4) (b) and (c) describing the characteristics of indiscriminate "means of combat" as those:

"[...]
(b) [...] which employ a [...] means of combat which cannot be directed at a specific military objective; or
(c) [...] which employ a [...] means of combat the effects of which cannot be limited as required by this Protocol;
and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction."

In the *Martic case* (Rule 61 proceeding), the ICTY Trial Chamber held in the context of the prohibition on attacking civilians:

"[...] even, if an attack is directed against a legitimate military target, the choice of weapon and its use are clearly delimited by the rules of international humanitarian law."[10]

In addition to Art. 35 (2) AP I, the Chamber explicitly referred to Arts. 51 (4) (b) and 51 (b) AP I.[11] With respect to the Prosecution's allegation that, in retaliation for a previous attack, the accused ordered the bombardment of civilians in Zagreb, using Orkan rockets delivering cluster bombs, it found:

"In respect of its accuracy and striking force, the use of the Orkan rocket in this case was not designed to hit military targets but to terrorize the civilians of Zagreb. These attacks are therefore contrary to the rules of customary and conventional international law [...]".[12]

(5) The requirement to take precautions with a view to sparing civilians

According to the ICRC Commentary to the grave breach as defined in Art. 85 (3) (a) AP I another element - not explicitly mentioned - is constituent of the offence:

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9 ICJ, Legality of the threat or use of nuclear weapons, Advisory Opinion of 8 July 1996, para. 78.
10 ICTY, *The Prosecutor v. Milan Martic*, IT-95-11-R61, ILR Vol. 108, para. 18, pp. 47 *et seq.*
11 ICTY, *The Prosecutor v. Milan Martic*, IT-95-11-R61, ILR Vol. 108, para. 18, pp. 47 *et seq.*
12 ICTY, *The Prosecutor v. Milan Martic*, IT-95-11-R61, ILR Vol. 108, para. 31, pp. 52 *et seq.*

"All precautions must be taken with a view to sparing civilians, both in planning and in carrying out an attack."[13]

This element seems to be well founded. In two early decisions of the "Tribunal arbitral mixte gréco-allemand" in 1927 this position was clearly expressed. In the *Coenca frères c. Etat allemand case* the Tribunal held:

"Att. qu'il appert des documents versés au procès:
1° Que le bombardement de Salonique en janvier 1916 a eu lieu sans avis préalable de la partie des autorités allemandes;
2° Que l'attaque a eu lieu la nuit;
3° Que le ballon dirigeable a lancé les bombes d'une altitude d'environ 3.000 mètres;
Att. qu'il est un des principes généralement reconnus par le droit des gens que les belligérants doivent respecter autant que possible, la population civile ainsi que les biens appartenant aux civils;
Att. que la Convention de La Haye de 1907, en s'inspirant de ce principe, a, dans l'art. 26 du Règlement concernant les lois et coutumes de la guerre sur terre, ordonné au commandant des troupes assaillantes avant d'entreprendre le bombardement, et sauf le cas d'attaque de vive force, de faire tout ce qui dépend de lui pour en avertir les autorités;
Att, qu'évidemment les auteurs de ladite convention ont, en exigeant un tel avis préalable, voulu accorder aux autorités de la ville menacée la possibilité soit d'éviter le bombardement en offrant la capitulation de la ville, soit de faire évacuer cette ville par la population civile;
[...]
Att. que l'obscurité de la nuit, l'altitude de 3.000 mètres et le fait que pendant l'occupation Salonique n'allumait pas ses lumières, ont dû empêcher de diriger les bombes avec précision nécessaire pour épargner les habitations de la population civile et les dépôts de marchandises;
Att. qu'il résulte de tout ce qui précède que le bombardement litigieux doit être considéré comme étant contraire au droit international;".[14]

An indication of necessary precautions is given in Art. 57 AP I:

"2. With respect to attacks, the following precautions shall be taken:
(a) those who plan or decide upon an attack shall:
(i) do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects and are not subject to special protection but are military objectives within the meaning of paragraph 2 of Article 52 and that it is not prohibited by the provisions of this Protocol to attack them;
(ii) take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss or civilian life, injury to civilians and damage to civilian objects;
(iii) refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian

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13 Zimmermann, in: Commentary on the AP, Art. 85, No. 3475, p. 995.

14 Recueil des décisions des Tribunaux arbitraux mixtes, vol. VIII, Paris, 1928, pp. 687 *et seq.*; see also the *C. Kiriadolou c. Etat allemand case*, *ibid.*, vol. X, Paris, 1930, pp. 102 *et seq.*

objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated;

(b) an attack shall be cancelled or suspended if it becomes apparent that the objective is not a military one or is subject to special protection or that the attack may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated;

(c) effective advance warning shall be given of attacks which may affect the civilian population, unless circumstances do not permit.

[...]

4. In the conduct of military operations at sea or in the air, each Party to the conflict shall, in conformity with its rights and duties under the rules of international law applicable in armed conflict, take all reasonable precautions to avoid losses of civilian lives and damage to civilian objects.

5. No provision of this article may be construed as authorizing any attacks against the civilian population, civilians or civilian objects."[15]

(6) Reprisals against the civilian population as such, or individual civilians

According to Art. 51 (6) AP I

"Attacks against the civilian population or civilians by way of reprisals are prohibited."

In the *Martic case*, the ICTY Trial Chamber (Rule 61 proceeding) held:

"[...] the rule which states that reprisals against the civilian population as such, or individual civilians, are prohibited in all circumstances, even when confronted by wrongful behaviour of the other party, is an integral part of customary international law and must be respected in all armed conflicts."[16]

In addition to Art. 51 (6) AP I, the Chamber based its findings on the following considerations:

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[15] A more recent formulation of what is meant by these rules of Art. 57 AP I may be found in the San Remo Manual on International Law Applicable to Armed Conflicts at Sea, Cambridge University Press, 1995, No. 46, p. 122:

"With respect to attacks, the following precautions shall be taken:

(a) those who plan, decide upon or execute an attack must take all feasible measures to gather information which will assist in determining whether or not objects which are not military objectives are present in an area of attack;

(b) in the light of the information available to them, those who plan, decide upon or execute an attack shall do everything feasible to ensure that attacks are limited to military objectives;

(c) they shall furthermore take all feasible precautions in the choice of methods and means in order to avoid or minimize collateral damage or damage; and

(d) an attack shall not be launched if it may be expected to cause collateral damage which would be excessive in relation to the concrete and direct military advantage anticipated from the attack as a whole; an attack shall be cancelled or suspended as soon as it becomes apparent that the collateral casualties or damage would be excessive."

[16] Decision (Review of Indictment), 08.03.96, No IT-95-11-I, para. 17, p. 7.

"The exclusion of the application of the principle of reprisals in the case of such fundamental humanitarian norms is confirmed by Article 1 common to all Geneva Conventions. Under this provision, the High Contracting Parties undertake to respect and to ensure respect for the Conventions in all circumstances, even when the behaviour of the other party might be considered wrongful. The International Court of Justice considered that this obligation does not derive only from the Geneva Conventions themselves but also from the general principles of humanitarian law (Case concerning Military and Paramilitary Activities in and against Nicaragua, Nicaragua v. United States of America, merits, ICJ Reports, 1986, paragraph 220). The prohibition on reprisals against the civilian population or individual civilians which is applicable to all armed conflicts, is reinforced by the texts of various instruments. General Assembly resolution 2675 [...] posits that 'civilian populations, or individual members thereof, should not be the object of reprisals'. [...] Although [Additional] Protocol II does not specifically refer to reprisals against civilians, a prohibition against such reprisals must be inferred from its Article 4. Reprisals against civilians are contrary to the absolute and non-derogable prohibitions enumerated in this provision. Prohibited behaviour must remain so 'at any time and in any time and in any place whatsoever'. The prohibition of reprisals against civilians in non-international armed conflicts is strengthened by the inclusion of the prohibition of 'collective punishment' in paragraph 2 (b) of Article 4 of Protocol II."[17]

N.B.: The view that the prohibition of reprisals against the civilian population is an integral part of customary international law is not uncontested. In this regard reference may be made to a specific reservation by the UK on its ratification of AP I:

"The obligations of Articles 51 and 55 are accepted on the basis that any adverse party against which the United Kingdom might be engaged will itself scrupulously observe those obligations. If an adverse party makes serious and deliberate attacks, in violation of Article 51 or Article 52 against the civilian population or civilians or against civilian objects, or, in violation of Articles 53, 54 and 55, on objects or items protected by those Articles, the United Kingdom will regard itself as entitled to take measures otherwise prohibited by the Articles in question to the extent that it considers such measures necessary for the sole purpose of compelling the adverse party to cease committing violations under those Articles, but only after formal warning to the adverse party requiring cessation of the violations has been disregarded and then only after a decision taken at the highest level of government. Any measures thus taken by the United Kingdom will not be disproportionate to the violations giving rise there to and will not involve any action prohibited by the Geneva Conventions of 1949 nor will such measures be continued after the violations have ceased. The United Kingdom will notify the Protecting Powers of any such formal warning given to an adverse party, and if that warning has been disregarded, of any measures taken as a result."[18]

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[17] ICTY, *The Prosecutor v. Milan Martic*, IT-95-11-R61, ILR Vol. 108, paras. 15 *et seq.*, p. 47.

[18] Corrected Letter of 28 January 1998 sent to the Swiss Government by Christopher Hulse, HM Ambassador of the United Kingdom.

bb) Remarks concerning the mental element

The ICTY Prosecution defined the mental element of "Unlawful attacks on civilians" as follows:

- The civilian status of the population or individual persons killed or seriously injured was known or should have been known;
- The attack was wilfully[19] directed at the civilian population or individual civilians; [...][20]

In the *Martic case* (Rule 61 proceeding), count III of the indictment (para. 17) stated that *"[o]n 3 May 1995, MILAN MARTIC, as president of the self-proclaimed RSK, **knowingly and wilfully ordered an unlawful attack against the civilian population and individual civilians** [...]"*[21] (emphasis added).

In the same case, the ICTY Trial Chamber referred to Art. 85 (3) (a) AP I to describe the mental element, i.e. "wilfully".[22]

According to the Commentary on the AP,

> *"[i]t is a grave breach [...] to make the civilian population or individual civilians, **knowing their status**, the object of attack when the attack is **wilfully** directed against them [and when the consequences defined in the opening sentence follow (when committed wilfully, in violation of the relevant provisions of this Protocol, and causing death or serious injury to body or health)]".*[23]

The notion of "wilfully" is defined in the Commentary as follows:

> *"the accused must have acted consciously and with intent, i.e., with his mind on the act and its consequences, and willing the ('criminal intent' or 'malice aforethought'); this encompasses the concepts of 'wrongful intent' or 'recklessness', viz., the attitude of an agent who, without being certain of a particular result, accepts the possibility of it happening; on the other hand, ordinary negligence or lack of foresight is not covered, i.e., when a man acts without having his mind on the act or its consequences (although failing to take the necessary precautions, particularly failing to seek precise information, constitutes culpable negligence punishable at least by disciplinary sanctions)".*[24]

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19 In the *Simic and others case* the ICTY Prosecution defined the notion of "wilful" as *"a form of intent which includes recklessness but excludes ordinary negligence. 'Wilful' means a positive intent to do something, which can be inferred if the consequences were foreseeable, while 'recklessness' means wilful neglect that reaches the level of gross criminal negligence."*, ICTY, The Prosecutor's Pre-trial Brief, *The Prosecutor v. Milan Simic, Miroslav Tadic, Stevan Todorovic, Simo Zaric*, IT-95-9-PT, p. 35.

20 ICTY, The Prosecutor's Pre-trial Brief, *The Prosecutor v. Dario Kordic and Mario Cerkez*, IT-95-14/2-PT, p. 48.

21 ICTY, *The Prosecutor v. Milan Martic*, IT-95-11, Count III of the indictment.

22 ICTY, *The Prosecutor v. Milan Martic*, IT-95-11-R61, ILR Vol. 108, para. 8, p. 44.

23 Zimmermann, in: Commentary on the AP, Art. 85, No. 3476, p. 995.

24 *Ibid.*, No. 3474, p. 994 (footnotes omitted).

With respect to the latter (failing to take the necessary precautions), the above cited provisions in Art. 57 AP I may be a further indication of what may be required from the perpetrator.

Based on these sources one might argue that the wilfulness of a conduct may be inferred from the fact that the necessary precautions (e.g. the use of available intelligence) were not taken before and during an attack.

Art. 8 (2) (b) (ii) - Intentionally directing attacks against civilian objects, that is, objects which are not military objectives

1. Results from the sources

Material elements

(1) The perpetrator directed the attack against a civilian object, i.e. did not direct the attack against a specific military objective.

Mental element

(2) The perpetrator knew or should have known the factual circumstances that established the civilian character of the objects attacked;
(3) The perpetrator acted wilfully.

2. Commentary

a) Treaty reference of the war crime

The terms "Intentionally directing attacks against civilian objects, that is, objects which are not military objectives" are derived to large extent from Art. 52 (1) AP I ("Civilian objects shall not be the object of attack or of reprisals.").

b) Legal basis

Neither the ICTY nor the ICTR has rendered any decision on this war crime to date. However, certain other sources may be helpful in interpreting various elements of this offence.

<u>aa) Remarks concerning the material element</u>

(1) General remarks

The ICTY Prosecution defined the mental element of "Unlawful attacks on civilian objects" as follows:

- An attack resulted in damage to civilian objects;
- The attack was [...] directed at civilian objects; [...][25]

Before dealing with specific sources dealing with this offence, it must be indicated that the sources cited under the section Art. 8 (b) (i) ICC-Statute - Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities with respect to indiscriminate attacks and necessary precautions with a view to sparing civilians apply also to this crime.

(2) Attack

The term attack is defined in Art. 49 (1) AP I and *"means acts of violence against the adversary, whether in offence or in defence"*.

As it has been pointed out above, the notion of attack as defined in this provision refers to the use of armed force to carry out a military operation during the course of an armed conflict. Therefore, the terms "offence" and "defence" must be understood independently from the meaning attributed to them by the law regulating the recourse to force under the UN Charter.

(3) Civilian Objects

According to Art. 52 (1) 2nd sentence civilian objects are all objects which are not military objectives as defined in Art. 52 (2) AP I. The latter provision reads as follows:

> *"In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage."*

Moreover, as provided for in Art. 52 (3) AP I,

> *"In case of doubt whether an object which is normally dedicated to civilian purposes, such as a place of worship, a house or other dwelling or a school, is being used to make an effective contribution to military action, it shall be presumed not to be so used."*

bb) Remarks concerning the mental element

The ICTY Prosecution defined the mental element of "Unlawful attacks on civilian objects" as follows:

- The civilian character of the objects damaged was known or should have been known;

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[25] ICTY, The Prosecutor's Pre-trial Brief, *The Prosecutor v. Dario Kordic and Mario Cerkez*, IT-95-14/2-PT, p. 49.

- The attack was wilfully[26] directed at civilian objects; [...][27]

The sources cited under Art. 8 (b) (i) ICC-Statute with respect to the notion of "wilful" apply also to this offence.

Art. 8 (2) (b) (iii) - Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict

1. Results from the sources

Material elements

(1) The perpetrator directed an attack against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations.
(2) The objects of attack were entitled to the protection given to civilians or civilian objects under the international law of armed conflict.

Mental element

(3) The perpetrator acted wilfully.

2. Commentary

This offence deals with two different kinds of conduct: attacks against humanitarian assistance missions and attacks against peacekeeping missions. Since both categories of victims derive their protected status from different sources, a separate approach is necessary with regard to each category.

a) Treaty reference of the war crime

There is no specific treaty reference of this war crime in the treaties of international humanitarian law describing the forms of criminalised conduct.

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[26] In the *Simic and others case* the ICTY Prosecution defined the notion of "wilful" as *"a form of intent which includes recklessness but excludes ordinary negligence. 'Wilful' means a positive intent to do something which can be inferred if the consequences were foreseeable, while 'recklessness' means wilful neglect that reaches the level of gross criminal negligence."*, ICTY, The Prosecutor's Pre-trial Brief, *The Prosecutor v. Milan Simic, Miroslav Tadic, Stevan Todorovic, Simo Zaric*, IT-95-9-PT, p. 35.

[27] ICTY, The Prosecutor's Pre-trial Brief, *The Prosecutor v. Dario Kordic and Mario Cerkez*, IT-95-14/2-PT, p. 49.

aa) Peacekeeping missions

The GC and AP I address the protection of relief operations in various provisions, but do not specifically address the protection of peacekeeping missions established in accordance with the Charter of the United Nations. However, the 1994 Convention on the Safety of United Nations and Associated Personnel prohibits attacks against United Nations and associated personnel, their equipment and premises. Art. 7 (1) of this Convention on the duty to ensure the safety and security of United Nations and associated personnel reads as follows:

> *"United Nations and associated personnel, their equipment and premises shall not be made the object of attack or of any action that prevents them from discharging their mandate."*

Art. 9 of the Convention is the basis for criminal prosecution:

> *"1. The intentional commission of:*
> *(a) A murder, kidnapping or other attack upon the person or liberty of any United Nations or associated personnel;*
> *(b) A violent attack upon the official premises, the private accommodation or the means of transportation of any United Nations or associated personnel likely to endanger his or her person or liberty;*
> *(c) A threat to commit any such attack with the objective of compelling a physical or juridical person to do or to refrain from doing any act;*
> *(d) An attempt to commit any such attack; and*
> *(e) An act constituting participation as an accomplice in any such attack, or in an attempt to commit such attack, or in organizing or ordering others to commit such attack,*
> *shall be made by each State Party a crime under its national law."*

bb) Humanitarian assistance missions

The protection of relief personnel is specifically dealt with in Art. 71 AP I which provides in para. 2:

> *"[Personnel participating in relief actions] shall be respected and protected".*

See also Art. 70 (2)-(4) AP I:

> *"2. The Parties to the conflict and each High Contracting Party shall allow and facilitate rapid and unimpeded passage of all relief consignments, equipment and personnel provided in accordance with this Section, even if such assistance is destined for the civilian population of the adverse Party.*
> *3. The Parties to the conflict and each High Contracting Party which allows the passage of relief consignments, equipment and personnel in accordance with paragraph 2:*
> *[...]*

(c) shall, in no way whatsoever, divert relief consignments from the purpose for which they are intended nor delay their forwarding, except in cases of urgent necessity in the interest of the civilian population concerned.

4. The Parties to the conflict shall protect relief consignments and facilitate their rapid distribution."

Attacks against such personnel, their installations, material, units or vehicles constitute a crime since such attacks would be equated to attacking civilians or civilian objects.

With regard to the protection of medical personnel participating in humanitarian assistance missions, their installations, material, units or vehicles the GC and AP I contain specific rules (see below references under section Art. 8 (2) (b) (xxiv) - Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law).

b) Legal basis

Neither the ICTY nor the ICTR has rendered any decision on this war crime to date. However, certain other sources may be helpful in interpreting various elements of this offence.

aa) Remarks concerning the material element

(1) Attack

The term attack is defined in Art. 49 (1) AP I and *"means acts of violence against the adversary, whether in offence or in defence"*.

As it has been pointed out above, the notion of attack as defined in this provision refers to the use of armed force to carry out a military operation during the course of an armed conflict. Therefore, the terms "offence" and "defence" must be understood independently from the meaning attributed to them by the law regulating the recourse to force under the UN Charter.

(2) Humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations

(a) Peacekeeping missions

There is no specific case law clarifying these notions. As has been pointed out above, the GC and AP I do not specifically address the protection of peacekeeping missions established in accordance with the Charter of the United Nations. However, some provisions of the 1994 Convention on the Safety of United Nations and Associated Personnel may give some guidance for the definition of the elements of this crime under the ICC Statute. The rules on the prohibition of attacks have been quoted above. Art. 1 of the Convention contains useful indications on the definition of protected personnel. However, it must be stressed that the

Convention limits the field of application of these definitions to the Convention itself and the personal field of application is not necessarily identical to the crime under the ICC Statute.

Art. 1 reads as follows:

> *"For the purposes of this Convention:*
> *(a) 'United Nations personnel' means:*
> *(i) Persons engaged or deployed by the Secretary-General of the United Nations as members of the military, police or civilian components of a United Nations operation;*
> *(ii) Other officials and experts on mission of the United Nations or its specialized agencies or the International Atomic Energy Agency who are present in an official capacity in the area where a United Nations operation is being conducted;*
> *(b) "Associated personnel" means:*
> *(i) Persons assigned by a Government or an intergovernmental organization with the agreement of the competent organ of the United Nations;*
> *(ii) Persons engaged by the Secretary-General of the United Nations or by a specialized agency or by the International Atomic Energy Agency;*
> *(iii) Persons deployed by a humanitarian non-governmental organization or agency under an agreement with the Secretary-General of the United Nations or with a specialized agency or with the International Atomic Energy Agency,*
> *to carry out activities in support of the fulfilment of the mandate of a United Nations operation;*
> *(c) "United Nations operation" means an operation established by the competent organ of the United Nations in accordance with the Charter of the United Nations and conducted under United Nations authority and control:*
> *(i) Where the operation is for the purpose of maintaining or restoring international peace and security; or*
> *(ii) Where the Security Council or the General Assembly has declared, for the purposes of this Convention, that there exists an exceptional risk to the safety of the personnel participating in the operation;*

In his Agenda for Peace the UN Secretary General defined the notion of "peace-keeping" as follows:

> *"Peace-keeping is the deployment of a United Nations presence in the field, hitherto with the consent of all the parties concerned, normally involving United Nations military and/or police personnel and frequently civilians as well. Peace-keeping is a technique that expands the possibilities for both the prevention of conflict and the making of peace."*[28]

However, he already pointed out that

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[28] UN Doc. A/47/277 - S/24111, 17 June 1992, Para. 20.

"[t]he established principles and practices of peace-keeping have responded flexibly to new demands of recent years [...]"[29]

The new aspects of recent mandates were addressed in a supplement to the Agenda for Peace.[30]

(b) Humanitarian assistance missions

There is no specific definition of a humanitarian assistance mission in the various treaties of international humanitarian law. As it has been indicated above, there are rules dealing with relief personnel, in particular Arts. 70 and 71 AP I, which read as follows:

Art 70 AP I - Relief actions
"1. If the civilian population of any territory under the control of a Party to the conflict, other than occupied territory, is not adequately provided with the supplies mentioned in Article 69, relief actions which are humanitarian and impartial in character and conducted without any adverse distinction shall be undertaken, subject to the agreement of the Parties concerned in such relief actions. [...]"

Art 71. Personnel participating in relief actions
"1. Where necessary, relief personnel may form part of the assistance provided in any relief action, in particular for the transportation and distribution of relief consignments; the participation of such personnel shall be subject to the approval of the Party in whose territory they will carry out their duties.
[...]"

These rules and the various rules dealing with medical personnel cited under section Art. 8 (2) (b) (xxiv) - Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law give the necessary guidance in this regard.

(3) As long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict

(a) General Remarks

The protection of civilians and civilian objects is more specifically dealt with in Arts. 51 (3) and 52 (2) AP I. According to Art. 51 (3) AP I

"[c]ivilians shall enjoy the protection afforded by this section, unless and for such time as they take a direct part in hostilities."

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[29] *Ibid.*, Para. 50.
[30] UN Doc. A/50/60 - S/1995/1, 25 January 1995, Paras. 33 *et seq.*

From this, one may conclude that civilians lose their protection when and as long as they take a direct part in hostilities.[31]

Art. 52 (2) AP I indicates when an object is no longer entitled to protection as a civilian object:

> *"[...] In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.."*

From this rule one may conclude that an object is entitled to protection, unless and for such time as it is used to make an effective contribution to the military action of a party to a conflict.

(b) Peacekeeping missions

With respect to peacekeeping missions these general rules must be linked to Art. 2 (2) of the 1994 Convention on the Safety of United Nations and Associated Personnel, which reads as follows:

> *"This Convention shall not apply to a United Nations operation authorized by the Security Council as an enforcement action under Chapter VII of the Charter of the United Nations in which any of the personnel are engaged as combatants against organized armed forces and to which the law of international armed conflict applies."*

Based on these rules, the personnel of peacekeeping missions are entitled to protection, unless and for such time as they take a direct part in hostilities, *i.e.* are engaged as combatants. Thus, the protection does not cease, in particular, if such persons only use armed force in exercise of their right to individual self defence. Installations, material, units or vehicles of peacekeeping missions are entitled to protection, unless and for such time as they are used specifically for these combatant purposes.

(c) Humanitarian assistance missions

There are specific rules in the GC and AP I on medical units, such as hospitals, equipment, etc. (see below references under section Art. 8 (2) (b) (xxiv) - Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law) and relief units (in

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[31] With regard to UN personnel this element is also reflected in Art. 2 (2) of the which reads as follows:
"This Convention shall not apply to a United Nations operation authorized by the Security Council as an enforcement action under Chapter VII of the Charter of the United Nations in which any of the personnel are engaged as combatants against organized armed forces and to which the law of international armed conflict applies."

particular the above cited Arts. 70 and 71 AP I) as well as its personnel which describe more particularly the conditions when the units or personnel lose their protection.

In sum, the personnel of humanitarian assistance missions lose their protection if they *commit, outside their humanitarian function, acts harmful to the enemy* (see especially Art. 13 (2) AP I). Installations, material, units or vehicles of humanitarian assistance missions lose their protection *if they are used to commit, outside the missions' humanitarian function, acts harmful to the enemy* (see for example Arts. 21 GC I, 34 GC II, 19 GC IV, 13 AP I).

bb) Remarks concerning the mental element

There seems to be no case law on the mental element of this crime to date.

Art. 8 (2) (b) (iv) - Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated

1. Results from the sources

Material elements

(1) The perpetrator launched an attack which caused incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment.
(2) The damage was excessive in relation to the concrete and direct military advantage anticipated.

Mental element

(3) The perpetrator acted wilfully and in the knowledge that the attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct military advantage anticipated.

2. Commentary

a) Treaty reference of the war crime

The terms "Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in

relation to the concrete and direct overall military advantage anticipated" are derived to a large extent from Arts. 51 (5) (b), 85 (3) (b) as well as Arts. 35 (3) and 55 (1) AP I.

With respect to the definition of collateral damage the words "clearly" and "overall" are added to the conventional definition in AP I, which reads as follows:

> *"an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated." (Arts. 51 (5) (b) and 57 (2) (a) (iii)).*

Further, the original 1980 Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices annexed to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects (Art. 3 (3) (c)) and the amended Protocol of 3 May 1996 (Art. 3 (8) (c)) contain the same language as in AP I. There are no legal sources using the terminology as contained in the Statute.

With regard to damage to the environment the Statute seems to combine the elements of Arts. 35 (3) and 55 AP I (widespread, long-term and severe) with the principle of proportionality, although these seem to be two distinct rules under current international law: on the one hand the prohibition to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment (as reflected in the mentioned provisions of AP I), and, on the other hand the prohibition to employ methods or means of warfare which are intended, or may be expected, to cause damage to the environment in violation of the principle of proportionality.[32] Thus, it is questionable whether a new threshold for this war crime has been created in the Statute. In addition, it must be indicated that there exists a third rule based on customary international law which provides that "[d]amage to or destruction of the natural environment not justified by military necessity and carried out wantonly is prohibited."[33]

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[32] This latter rule on disproportionate damage seems to reflect customary international law: see for example Green, The Environment and the Law of Conventional Warfare, in: Canadian Yearbook of International Law 1991, pp. 222 *et seq.;* Plant, Environmental Protection and the Law of War: A 'Fifth Geneva' Convention on the Protection of the Environment in Time of Armed Conflict, London/New York 1992, p. 17; Falk, The Environmental Law of War: an Introduction, in: Plant, Environmental Protection and the Law of War: A 'Fifth Geneva' Convention on the Protection of the Environment in Time of Armed Conflict, London/New York 1992, pp. 84 *et seq.;* Feliciano, Marine Pollution and Spoliation of Natural Resources as War Measures: A Note on Some International Law Problems in the Gulf War, in: Ateneo Law Journal, Vol. 39 No. 2, 1995, pp. 27 *et seq.;* the majority of experts who participated in the first Meeting of Experts on the Protection of the Environment in Time of Armed Conflict, initiated by the ICRC, see UN Doc. A/47/328, 31 July 1992, para. 54; the 1994 Guidelines for Military Manuals and Instructions prepared by the ICRC (see UN Doc. A/49/323, 19 August 1994, Annex, para. II. 4.), endorsed by the UN General Assembly in 1996 (UN Doc. A/Res/51/157, 30 January 1997, Annex, para. 19).

[33] See for example San Remo Manual on International Law Applicable to Armed Conflicts at Sea, Cambridge University Press, 1995, No. 44 with commentary, p. 122; UN General Assembly Resolution 47/37 of 25 November 1992; the Guidelines for Military Manuals and Instructions prepared by the ICRC (UN Doc. A/49/323, 31 July 1992, Annex, para. III. 8. and 9.), endorsed by the UN General Assembly in 1996 (UN Doc. A/Res/51/157, 30 January 1997, Annex, para. 19); Fauteux, The Use of the Environment as an Instrument of War in Occupied Kuwait", in: Schiefer (ed.), Verifying Obligations Respecting Arms Control and Environment: A Post Gulf War Assessment", 1992, pp. 59 *et seq.*; Oeter, in: Fleck (ed.), The Handbook of Humanitarian Law in Armed Conflicts, p. 118.

b) Legal basis

Neither the ICTY nor the ICTR has rendered any decision on this war crime to date. However, certain other sources may be helpful in interpreting various elements of this offence.

aa) Remarks concerning the material element

(1) Attack

The term attack is defined in Art. 49 (1) AP I, and *"means acts of violence against the adversary, whether in offence or in defence"*.

As it has been pointed out above, the notion of attack as defined in this provision refers to the use of armed force to carry out a military operation during the course of an armed conflict. Therefore, the terms "offence" and "defence" must be understood independently from the meaning attributed to them by the law regulating the recourse to force under the UN Charter.

(2) Incidental loss of life or injury to civilians [...] which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated

As it has been emphasised above, the addition of the words "clearly" and "overall" in the definition of collateral damage is not reflected in any existing legal source. Therefore, the addition must be understood as not changing existing law. This fact was already expressed by the ICRC at the Rome conference. It further stated:

> *"The word 'overall' could give the impression that an extra unspecified element has been added to a formulation that was carefully negotiated during the 1974-1977 Diplomatic Conference that led to Additional Protocol I to the 1949 Geneva Conventions and this formulation is generally recognized as reflecting customary law. The intention of this additional word appears to be to indicate that a particular target can have an important military advantage that can be felt over a lengthy period of time and affect military action in areas other than the vicinity of the target itself. As this meaning is included in the existing wording of Additional Protocol I, the inclusion of the word 'overall' is redundant; [...]"*[34]

The following sources may give further guidance with respect to specific aspects of the rule of proportionality.

With respect to collateral damage or injury the Canadian military manual states the following:

> *"Collateral damage of injury would be unlawful in any instance in which such injury or damage is so excessive, when compared to the military advantage expected to be gained by the attack, as to clearly indicate wilful intent or wanton disregard for the safety of the civilian population. In other circumstances, deference must of necessity*

[34] UN Doc. A/CONF.183/INF/10 of 13 July 1998.

be paid to the honest judgment of responsible commanders, based on the information reasonably available to them at the relevant time, and taking fully into account the urgent and difficult circumstances under which such judgments must usually be made."[35]

With respect to the notion of military advantage several States made declarations under AP I:

A number of States expressed their understanding that the military advantage anticipated from an attack is intended to refer to the advantage anticipated from the attack considered as a whole and not from isolated or particular parts of the attack.[36] Australia and New Zealand more specifically stated at the time of ratification in almost identical wording:

"In relation to paragraph 5 (b) of Article 51 and to paragraph 2 (a) (iii) of Article 57, it is the understanding of Australia that references to the "military advantage" are intended to mean the advantage anticipated from the military attack considered as a whole and not only from isolated or particular parts of that attack and that the term "military advantage" involves a variety of considerations including the security of attacking forces. It is further the understanding of Australia that the term "concrete and direct military advantage anticipated", used in Articles 51 and 57, means a bona fide expectation that the attack will make a relevant and proportional contribution to the objective of the military attack involved."[37]

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[35] Canadian Law of Armed Conflict Manual (Second Draft, 1986), p. 5-29. See also Australian Defence Force, Operation Series, Commander's Guide, ADFP 37 Suppl. 1, p. 9-10.

[36] Belgium: *"With respect to Articles 51 and 57, the Belgian Government interprets the 'military advantage' mentioned therein as being that expected from an attack considered in its totality."*
Canada: *"It is the understanding of the Government of Canada in relation to sub-paragraph 5 (b) of Article 51, paragraph 2 of Article 52, and clause 2 (a) (iii) of Article 57 that the military advantage anticipated from an attack is intended to refer to the advantage anticipated from the attack considered as a whole and not from isolated or particular parts of the attack."*
Germany: *"In applying the rule of proportionality in Article 51 and Article 57, "military advantage" is understood to refer to the advantage anticipated from the attack considered as a whole and not only from isolated or particular parts of the attack."*, Notification by the depositary addressed to the ICRC on 15 February 1991 (Translation provided by Germany upon ratification).
Italy: *"In relation to paragraph 5 (b) of Article 51 and paragraph 2 (a) (iii) of Article 57, the Italian Government understands that the military advantage anticipated from an attack is intended to refer to the advantage anticipated from the attack as a whole and not only from isolated or particular parts of the attack."*
Netherlands: *"It is the understanding of the Government of the Kingdom of the Netherlands that military advantage refers to the advantage anticipated from the attack considered as a whole and not only from isolated or particular parts of the attack"*, Notification by the depositary addressed to the ICRC on 10 July 1987.
Spain: *"It is the understanding [of the Spanish Government] that the 'military advantage' which these articles mention refers to the advantage expected from the attack as a whole and not from isolated parts of it."*, Notification by the depositary addressed to the ICRC on 24 November 1989.
UK: *"In the view of the United Kingdom, the military advantage anticipated from an attack is intended to refer to the advantage anticipated from the attack considered as a whole and not only from isolated or particular parts of the attack."*, Corrected Letter of 28 January 1998 sent to the Swiss Government by Christopher Hulse, HM Ambassador of the United Kingdom.

[37] Notification by the depositary addressed to the ICRC on 24 June 1991 (Australia), Notification by the depositary addressed to the ICRC on 12 February 1988 (New Zealand).

However, to the knowledge of the authors, no official explanation is given by these States on the meaning of "attack as a whole". It certainly cannot mean in the sense of the whole conflict. Such an interpretation could hardly be reconciled with the meaning of the words "concrete and direct"[38] and it would confuse "proportionality" as required by the ius ad bellum rules of self-defence, and the rules of proportionality in attack in the ius in bello. In the latter instance, which is relevant to the crime under consideration here, the commander must be able to reasonably foresee before launching the attack on a target its military utility, the likely civilian casualties and whether the latter would be excessive. In order to determine how to judge the value of a military target, the following legal writings, which support the above mentioned declarations, may be quoted:

Solf concludes the following:

> *"Whether a definite military advantage would result from an attack must be judged in the context of the military advantage anticipated from the specific military operation of which the attack is a part considered as a whole, and not only from isolated or particular parts of that operation. It is not necessary that the contribution made by the object to the Party attacked be related to the advantage anticipated by the attacker from the destruction, capture or neutralization of the object. Thus, prior to the 1944 cross channel operation, the Allies attacked a large number of bridges, fuel dumps, airfields and other targets in the Pas de Calais. These targets made an effective contribution to German military action in that area. The primary military advantage of these attacks anticipated by the Allies, however, was not to reduce German military strength in that area, but to deceive the Germans into believing that the Allied amphibious assault would occur in the Pas de Calais instead of the beaches of Normandy. Therefore, the military advantage expected from these air raids was not related to their value to the adverse Party."*[39]

Oeter describes the purpose of the German declaration in the following terms:

> *"The separate action within an operation, that could be described as a specific 'attack', is hardly ever an end in itself. Normally such an action is directed towards a goal which lies outside the single action, as a part of the complex mosaic of a bigger integrated operation conceived in a kind of division of labour, and thus depends in its purpose on the aggregate strategy of the party to the conflict. The aggregate military operation of the belligerent may not be divided up into too many individual actions, otherwise the operative purpose for which the overall operation was designed slips out of sight. It is this elementary condition of any sensible interpretation of the concept of 'military advantage' which the German Government [...] took into account [...]"*[40]

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[38] "Concrete" means specific, not general; perceptible to the senses, see Bothe/Partsch/Solf, New Rules for Victims of Armed Conflicts, Commentary to the AP, Art. 57, p. 365. "Direct" means "without intervening condition or agency". A remote advantage to be gained at some unknown time in the future is not to be included in the proportionality equation, see *ibid.*; San Remo Manual on International Law Applicable to Armed Conflicts at Sea, Cambridge University Press, 1995, No. 46.5, p. 124.

[39] Bothe/Partsch/Solf, New Rules for Victims of Armed Conflicts, Commentary to the AP, Art. 52, pp. 324 *et seq.*

[40] Oeter, in: Fleck (ed.), The Handbook of Humanitarian Law in Armed Conflicts, p. 162.

> *"[The German interpretative declaration] means that the point of reference of the required balancing is not the gain of territory or other advantage expected from the isolated action of a single unit, but the wider military campaign of which that action forms part. Only in the framework of the more complex overall campaign plan of a belligerent can one assess the relative military value of the specific purpose of an individual attack. [...] actions of individual units [...] must be placed in their operational context."*[41]

From these sources one may conclude that the military value of an object may be determined by taking into account the broader strategic purpose of a particular military operation that may consist of various individual actions.

On the other hand it must be emphasised also that the same scale has to be applied with regard to both the military advantage and the corresponding civilian casualties.[42] This means that the foreseeable military advantage of a particular military operation must be weighed against the foreseeable civilian casualties of such an operation.

(3) Widespread, long-term and severe damage to the natural environment

This sub-section deals with some specific problems concerning the notions of "widespread", "long-term", "severe" and "environment". With regard to the questions arising from the combination of elements of Arts. 35 (3) and 55 AP I on the one hand and the rule of proportionality on the other hand, see the introductory remarks under the section a) Treaty reference of the war crime.

The ICJ in its advisory opinion on the legality of the threat or use of nuclear weapons referred to some aspects of the protection of the natural environment. The court confirmed that States when exercising their right of self-defence under international law

> *"must take environmental considerations into account when assessing what is necessary and proportionate in the pursuit of legitimate military objectives. Respect for the environment is one of the elements that go to assessing whether an action is in conformity with the principles of necessity and proportionality.*
> *This approach is supported, indeed, by the terms of Principle 24 of the Rio Declaration, which provides that: "Warfare is inherently destructive of sustainable development. States shall therefore respect international law providing protection for the environment in times of armed conflict and cooperate in its further development, as necessary."*[43]

It further stated:

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41 Oeter, in: Fleck (ed.), The Handbook of Humanitarian Law in Armed Conflicts, p. 119.

42 Sassoli, Bedeutung einer Kodifikation fuer das allgemeine Voelkerrecht mit besonderer Beachtung der Regeln zum Schutze der Zivilbevoelkerung vor den Auswirkungen von Feindseligkeiten, Basel/Frankfurt a.M., 1990, p. 415, with further references.

43 ICJ, Legality of the threat or use of nuclear weapons, Advisory Opinion of 8 July 1996, para. 30.

"The Court notes furthermore that Articles 35, paragraph 3, and 55 of Additional Protocol I provide additional protection for the environment. Taken together, these provisions embody a general obligation to protect the natural environment against widespread, long-term and severe environmental damage; the prohibition of methods and means of warfare which are intended, or may be expected, to cause such damage; and the prohibition of attacks against the natural environment by way of reprisals. These are powerful constraints for all the States having subscribed to these provisions.

General Assembly resolution 47/37 of 25 November 1992 on the Protection of the Environment in Times of Armed Conflict, is also of interest in this context. It affirms the general view according to which environmental considerations constitute one of the elements to be taken into account in the implementation of the principles of the law applicable in armed conflict: it states that 'destruction of the environment, not justified by military necessity and carried out wantonly, is clearly contrary to existing international law'. Addressing the reality that certain instruments are not yet binding on all States, the General Assembly in this resolution '[a]ppeals to all States that have not yet done so to consider becoming parties to the relevant international conventions.'"[44]

The ILC particularly dealt with the notions of "widespread", "long-term", "severe" and "natural environment" in its Report on the work of its forty-third session 1991. According to the Commentary on Art. 26 of the Draft

"[t]he words 'natural environment' should be taken broadly to cover the environment of the human race and where the human race develops, as well as areas the preservation of which is of fundamental importance in protecting the environment. These words therefore cover the seas, the atmosphere, climate, forests and other plant cover, fauna, flora and other biological elements. [...] article 2 of the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques [...] defines the expression 'environmental modification technique' as 'any technique for changing - through the deliberate manipulation of natural processes - the dynamics, composition or structure of the earth, including its biota, lithosphere, hydrosphere and atmosphere, or of outer space'."[45]

In the view of the ILC the expressions "widespread, long-term and severe damage" describe

"the extent or intensity of the damage, its persistence in time, and the size of the geographical area affected by the damage. It was explained in the Commission that the word 'long-term' should be taken to mean the long-lasting nature of the effects and not the possibility that the damage would occur a long time afterwards."[46]

The ICRC in its 1993 Report to the UN General Assembly noted on the threshold set by Arts. 35 (3) and 55 AP I:

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[44] *Ibid.*, para. 31 *et seq.*

[45] GAOR, 46th session, supplement No. 10 (A/46/10), p. 276.

[46] *Ibid.* See also A/CN.4/SR.2241, 22 August 1991, pp. 15, 18.

"The question as to what constitutes 'widespread, long-term and severe' damage and what is acceptable damage to the environment is open to interpretation. There are substantial grounds, including from the travaux préparatoires of Protocol I, for interpreting 'long-term' to refer to decades rather than months. On the other hand, it is not easy to know in advance exactly what the scope and duration of some environmentally damaging acts will be; [...]"[47]

N.B.: The German Military Manual defines:

"'Widespread', 'long-term' and 'severe' damage to the natural environment is a major interference with human life or natural resources which considerably exceeds the battlefield damage to be regularly expected in a war."[48]

bb) Remarks concerning the mental element

As in Art. 85 (3) (b) AP I the ICC Statute presupposes that the attack was launched in the knowledge that consequences listed occur. With respect to the notion "in the knowledge" the ICRC Commentary to Art. 85 AP I points out:

"This sub-paragraph [...] adds the words "in the knowledge" [...]: therefore there is only a grave breach if the person committing the act knew with certainty that the described results would ensue, and this would not cover recklessness."[49]

N.B.: On the contrary, Art. 51 (5) of the AP I prohibits attacks *"which may be expected to cause"* the aforesaid damage and loss. The threshold for a conduct constituting a violation of international humanitarian law is therefore lower than for a war crime.

Art. 8 (2) (b) (v) - Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives

1. Results from the sources

Material elements

(1) The Perpetrator attacked or bombarded, by whatever means, a town, village, dwelling or building.
(2) The town, village, dwelling or building was undefended, i.e.
  (a) it was open for occupation;
  (b) all combatants, as well as mobile weapons and mobile military equipment have been evacuated;
  (c) no hostile use has been made of fixed military installations or establishments;
  (d) no acts of hostility have been committed by the authorities or by the population; and

[47] UN Doc. A/48/269, p. 9. See also A/47/328, 31 July 1992, paras. 20, 63.
[48] Humanitarian Law in Armed Conflicts Manual (Germany), 1992, no. 403, p. 37.
[49] Zimmermann, in: Commentary on the AP, Art. 85, No. 3479, p. 996.

(e) no activities in support of military operations have been undertaken;

(3) The town, village, dwelling or building did not constitute a military objective.

Mental element

(4) The perpetrator acted wilfully and was aware of the facts rendering a town, village, dwelling or building undefended.

2. Commentary

a) Treaty reference of the war crime

The terms "Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives" are directly derived from Art. 25 of the 1907 Hague Regulations with the sole exception that the words "and which are not military objectives" are added.

b) Legal basis

Neither the ICTY nor the ICTR has rendered any decision on this war crime to date. However, certain other sources may be helpful in interpreting various elements of this offence.

aa) Remarks concerning the material element

(1) Attack

The term attack is defined in Art. 49 (1) AP I and *"means acts of violence against the adversary, whether in offence or in defence"*.

As it has been pointed out above, the notion of attack as defined in this provision refers to the use of armed force to carry out a military operation during the course of an armed conflict. Therefore, the terms "offence" and "defence" must be understood independently from the meaning attributed to them by the law regulating the recourse to force under the UN Charter.

(2) By whatever means

According to the U.S. Military Manual, the term was added to cover air bombardment.[30]

[30] Department of the Air Force, AF Pamphlet 110-31, International Law - The Conduct of Armed Conflict and Air Operations, 1976, p. 5-12.

(3) Non-defended Locality

In one case in the aftermath of the Second World War the Tokyo District Court dealt also with Art. 25 of the 1907 Hague Regulations in the *Shimoda Case* analysing attacks by nuclear weapons. The Court looked at the lawfulness of indiscriminate bombing as a method of warfare. However, most of the judgement referred to the law applicable at the time and this involved an outdated distinction between bombing defended and undefended cities. Therefore, the findings of the Court are of limited relevance to the present state of law. Of certain interest may be the statement on a defended city in so far as it contains the definition of a defended city and emphasises that only military objectives may be attacked in such a city:

> *"In principle, a defended city is a city which resists an attempt at occupation by land forces. A city even with defence installations and armed forces cannot be said to be a defended city if it is far away from the battlefield and is not in immediate danger of occupation by the enemy. Since there is no military necessity for indiscriminate bombardment, only bombing of military objectives there is permissible."*[51]

With regard to the current status of international law, a possible conclusion that the indiscriminate bombing of a defended city on or near the battlefield could be lawful is unfounded.

Art. 59 AP I gives a more recent indication of what constitutes an undefended locality/place, such as towns, villages, dwellings or buildings as listed in Art. 25 of the 1907 Hague Regulations and thus the ICC Statute.

As it is pointed out in the ICRC Commentary, Art. 59 (1) AP I

> *"reiterates almost entirely the rule contained in Article 25 of the Hague Regulations of 1907. Under this paragraph, which confirms and codifies customary law, a locality becomes a non-defended locality whenever the conditions laid down in the following paragraphs are met. Unilateral declarations and agreements merely serve to confirm this situation."*[52]

> *"Paragraph 1 lays down the rule, which must be obeyed even in the absence of a declaration or an agreement and the article continues by defining the conditions with which a non-defended locality must comply."*[53]

Art. 59 AP I reads as follows:

> *"1. It is prohibited for the Parties to the conflict to attack, by any means whatsoever, non-defended localities.*
> *2. The appropriate authorities of a Party to the conflict may declare as a non-defended locality any inhabited place near or in a zone where armed forces are*

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51 *Ryuichi Shimoda et al. v. The State*, ILR Vol. 32, para. 7, p. 631.

52 Pilloud/Pictet, in: Commentary on the AP, Art. 59, No. 2263, pp. 700 *et seq.*; see also Oeter, in: Fleck (ed.), Handbuch des Humanitaeren Voelkerrechts in bewaffneten Konflikten, pp. 150 *et seq.*

53 Pilloud/Pictet, in: Commentary on the AP, Art. 59, No. 2267, p. 701.

in contact[54] which is open for occupation by an adverse Party. Such a locality shall fulfil the following conditions:

(a) all combatants, as well as mobile weapons and mobile military equipment must have been evacuated;

(b) no hostile use shall be made of fixed military installations or establishments;

(c) no acts of hostility shall be committed by the authorities or by the population; and

(d) no activities in support of military operations shall be undertaken.

3. The presence, in this locality, of persons specially protected under the Conventions and this Protocol, and of police forces retained for the sole purpose of maintaining law and order, is not contrary to the conditions laid down in paragraph 2.

4. The declaration made under paragraph 2 shall be addressed to the adverse Party and shall define and describe, as precisely as possible, the limits of the non-defended locality. The Party to the conflict to which the declaration is addressed shall acknowledge its receipt and shall treat the locality as a non-defended locality unless the conditions laid down in paragraph 2 are not in fact fulfilled, in which event it shall immediately so inform the Party making the declaration. Even if the conditions laid down in paragraph 2 are not fulfilled, the locality shall continue to enjoy the protection provided by the other provisions of this Protocol and the other rules of international law applicable in armed conflict.

5. The Parties to the conflict may agree on the establishment of non-defended localities even if such localities do not fulfil the conditions laid down in paragraph 2. The agreement should define and describe, as precisely as possible, the limits of the non-defended locality; if necessary, it may lay down the methods of supervision.

6. The Party which is in control of a locality governed by such an agreement shall mark it, so far as possible, by such signs as may be agreed upon with the other Party, which shall be displayed where they are clearly visible, especially on its perimeter and limits and on highways.

7. A locality loses its status as a non-defended locality when it ceases to fulfil the conditions laid down in paragraph 2 or in the agreement referred to in paragraph 5. In such an eventuality, the locality shall continue to enjoy the protection provided by the other provisions of this Protocol and the other rules of international law applicable in armed conflict."

In sum, the following elements are constituent for a non-defended locality:

- the inhabited place must be open for occupation;[55] (N.B.: This presupposes that the inhabited place must be near or in a zone where adverse armed forces are present.)
- all combatants, as well as mobile weapons and mobile military equipment must have been evacuated;
- no hostile use shall be made of fixed military installations or establishments;

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[54] The words used are based on a definition given by a special Working Group of the Diplomatic Conference: Report of a mixed group, March 1975, cf. O.R. XV, p. 338, CDDH/II/266-CDDH/III/255, Annex A: *"'Contact Area' means, in an armed conflict, that area where the most forward elements of the armed forces of the adverse Parties are in contact with each other."*

[55] This principle has already been confirmed in the *Ohlendorf case* (Einsatzgruppen Trial): *"[...] a city is assured of not being bombed by the law-abiding belligerent if it is declared an open city [...]"*, see UN War Crimes Commission, Law Reports of Trials of War Criminals, vol. XV, p. 111. See also Greenspan, The Modern Law of Land Warfare, 1959, p. 332.

- no acts of hostility shall be committed by the authorities or by the population; and
- no activities in support of military operations shall be undertaken.

It has to be understood that whenever these conditions are not fulfilled a place may not be considered as undefended and entitled to the protection under this rule. However, the attacking party must respect other applicable rules for the protection of civilians and civilian objects. Thus, an attack may still be a crime under other rules of Art. 8 (2) (b) of the ICC Statute, in particular Art. 8 (2) (b) (i), (ii), (iv).

The declaration mentioned in para. 2 has only declaratory value, whereas an agreement in accordance with Art. 59 (5) AP I would be constituent.

N.B.: Additional guidance for the interpretation of this offence may be drawn from various military manuals, which confirm *grosso modo* the results of the above-cited sources.

The U.S. Military Manual indicates:

> *"An undefended place, within the meaning of Article 25, HR, is any inhabited place near or in a zone where opposing armed forces are in contact which is open for occupation by an adverse party without resistance. In order to be considered as undefended, the following conditions should be fulfilled:*
> *(1) Armed forces and all other combatants, as well as mobile weapons and mobile military equipment, must have been evacuated, or otherwise neutralized;*
> *(2) no hostile use shall be made of fixed military installations or establishments;*
> *(3) no acts of hostility shall be committed by the authorities or by the population; and*
> *(4) no activities in support of military operations shall be undertaken.*
> *The presence, in the place, of medical units, wounded and sick, and police forces retained for the sole purpose of maintaining law and order does not change the character of such an undefended place."*[56]

The Swiss Military Manual states:

> *"Au moyen de déclarations particulières réciproques, les Parties au conflit peuvent désigner les localités non défendues [...]. Ces localités [...] doivent cependant répondre au conditions suivants:*
> *a) tous les combattants, ainsi que les armes et le matériel militaire mobiles devront avoir été évacués;*
> *b) il ne doit pas être fait un usage hostile des installations ou des établissements militaires fixes;*
> *c) les autorités et la population ne commettront pas d'actes d'hostilité;*
> *d) aucune activité à l'appui d'opérations militaires ne doit être entreprise;*
> *e) les localités [...] doivent être marquées."*[57]

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[56] Department of the Army Field Manual, FM 27-10, The Law of Land Warfare, 1956, No. 39 as amended on 15 July 1976. See also Department of the Air Force, AF Pamphlet 110-31, International Law - The Conduct of Armed Conflict and Air Operations, 1976, p. 5-12. See also Canadian Law of Armed Conflict Manual (Second Draft, 1986), pp. 4-20 *et seq.*; Australian Defence Force, Operation Series, Commander's Guide, ADFP 37 Suppl. 1, p. 9-5.

[57] Art. 31 (2), Règlement suisse, Lois et coutumes de la guerre, Règlement 51.7/II f, 1987, p. 10.

The UK Military Manual reads as follows:

> *"An undefended or open town is a town which is so completely undefended from within or without [artillery or minefields] that the enemy may enter and take possession of it without fighting or incurring casualties."*[58]
> *"A town may be considered defended if a military force is in occupation of or marching through it."*[59]

(4) Military objective

Military objectives in so far as objects are concerned are defined in Art. 52 (2) AP I. The provision reads as follows:

> *"In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage."*

Moreover, as provided for in Art. 52 (3) AP I,

> *"In case of doubt whether an object which is normally dedicated to civilian purposes, such as a place of worship, a house or other dwelling or a school, is being used to make an effective contribution to military action, it shall be presumed not to be so used."*

N.B.: Comparing the constituent elements for a non-defended locality and the definition of a military objective, a non-defended locality cannot be considered a military objective, which may be lawfully attacked. Since the adversary has deliberately excluded such a place from his military activities and is open for occupation, it cannot make an effective contribution to military action. The intended military advantage could be achieved by mere occupation without combat activity, and a bombardment or an attack using armed force would be evidently unnecessary.[60]

bb) Remarks concerning the mental element

It seems that there are no specific requirements for the mental element besides those already contained in Art. 30 of the ICC Statute.

With respect to Art. 85 (3) (d) AP I defining the act of making non-defended localities and demilitarized zones the object of attack as a grave breach when committed wilfully, in violation of the relevant provisions of this Protocol, and causing death or serious injury to

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[58] The Law of War on Land being Part III of the Manual of Military Law, 1958, p. 97.
[59] *Ibid.*, p. 96.
[60] Oeter, in: Fleck (ed.), Handbuch des Humanitaeren Voelkerrechts in bewaffneten Konflikten, p. 150 with further references.

body or health, the ICRC Commentary indicates that the attacker must be aware of its status as a non-defended locality,[61] i.e. aware of the underlying facts.

Art. 8 (2) (b) (vi) - Killing or wounding a combatant who, having laid down his arms or having no longer means of defence, has surrendered at discretion

1. Results from the sources

Material elements

(1) The perpetrator killed or wounded a person hors de combat.

Mental element

(2) The perpetrator knew or should have known the factual circumstances that rendered a person *hors de combat*.
(3) The perpetrator acted wilfully.

2. Commentary

a) Treaty reference of the war crime

The terms "Killing or wounding a combatant who, having laid down his arms or having no longer means of defence, has surrendered at discretion" are directly derived from Art. 23 (c) Hague Regulations. A more recent formulation of this offence may be seen in Art. 41 (1) and (2) AP I, prohibiting attacks against persons *hors de combat*.

b) Legal basis

Neither the ICTY nor the ICTR has rendered any decision on this war crime to date. However, certain other sources may be helpful in interpreting various elements of this offence.

It must be indicated that there is a considerable overlap between this offence as contained in Art. 8 (2) (b) (vi) of the Statute (Art. 23 (c) of the Hague Regulations), Art. 8 (2) (a) (i) of the Statute (Wilful killing) and Art. 8 (2) (b) (xii) of the Statute (Declaring that no quarter will be given). This overlap becomes apparent in the case law cited below.

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[61] Zimmermann, in: Commentary on the AP, Art. 85, No. 3490, p. 997.

aa) Remarks concerning the material element

Many of the decisions in the aftermath of World War II related to cases of killing of prisoners of war. The indictments and judgments made very often reference to Art. 23 (c) Hague Regulations and Art. 2 of the 1929 Geneva Convention.[62]

In the *Dostler case* the U.S. Military Commission found that the illegality of orders to kill prisoners of war must be known. As the Commentator of the WCC pointed out by referring to Art. 2 (3) of the 1929 Geneva Convention relative to the Treatment of Prisoners of War: *"No soldier, and still less a Commanding General, can be heard to say that he considered the summary shooting of prisoners of war legitimate even as a reprisal."*[63]

In addition to these judgments, one case from after the First World War[64] is of some interest: One accused was charged with having issued an order to the effect that all prisoners and wounded were to be killed. The alleged orders were:

> *"No prisoners are to be taken from to-day onwards; all prisoners, wounded or not, are to be killed,"* and
> *"All the prisoners are to massacred; the wounded, armed or not, are to be massacred; even men captured in large organised units are to be massacred. No enemy must remain alive behind us."*[65]

The other accused was charged with having passed on the above-mentioned order. The Tribunal found that there was no proof that such an order was given.[66] Therefore, the first accused was acquitted. However, the second accused acted in the mistaken idea that the order had been issued. He was not conscious of the illegality of such an order. The Tribunal held in the following:

> *"So pronounced a misconception of the real facts seems only comprehensible in view of the mental condition of the accused. [...] But this merely explains the error of the accused; it does not excuse it. ... Had he applied the attention which was to be expected from him, what was immediately clear to many of his men would not have escaped him, namely, that the indiscriminate killing of all wounded was a monstrous war measure, in no way to be justified."*[67]

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[62] See *inter alia Jaluit Atoll case*, U.S. Military Commission, UN War Crimes Commission, Law Reports of Trials of War Criminals, vol. I, pp. 72 *et seq.*; *Dreierwalde case*, British Military Court, *ibid.*, pp. 82, 86 (killing of prisoners of war); *Thiele and Steinert case*, U.S. Military Commission, *ibid.*, vol. III, p. 57 (killing of prisoners of war); *Schosser, Goldbrunner and Wilm case*, U.S. Military Commission, *ibid.*, pp. 65 *et seq.* (killing of an unarmed prisoner of war with no reference to a specific provision); *A. Bury and W. Hafner case*, U.S. Military Commission, *ibid.*, pp. 62 *et seq.* (killing of prisoners of war); *K. Meyer case*, Canadian Military Court, *ibid.*, vol. IV, pp. 97 *et seq.* (order to kill prisoners of war); *K. Rauter and Others case*, British Military Court, *ibid.*, vol. IV, pp. 113 *et seq.* (killing of prisoners of war).

[63] U.S Military Commission, Rome, in: UN War Crimes Commission, Law Reports of Trials of War Criminals, vol. I, p. 31.

[64] *Karl Strenger and Benno Crusius case*, in: Claud Mullins, The Leipzig Trials, London, 1921, pp. 151 *et seq.*

[65] *Ibid.*, p. 152.

[66] *Ibid.*, p. 159.

[67] *Ibid.*, pp. 160 *et seq.*

Other post Second World War cases dealt with the killing of shipwrecked members of a crew or persons who had parachuted in distress.

In the *P. Back case* the accused - a civilian - was charged with violating *"the laws and usages of war by wilfully, deliberately and feloniously killing an American airman [...], who had parachuted to earth [...] in hostile territory and was then without any means of defence"*. The unarmed airman had been forced to descend by parachute. The accused was found guilty.[68]

In the *Peleus Trial* the accused were charged with *"[c]ommitting a war crime in that [...] [they] in violation of the laws and usages of war were concerned in the killing of members of the crew of [a] steamship [they had sunk] [...] by firing and throwing grenades at them."* The Prosecution clarified that the accused had not violated the laws and usages of war by sinking the ship, but only by firing and throwing grenades on the survivors of the sunken ship.[69] The accused were found guilty.

The facts in one post First World War trial were quite similar. In *The Llandovery Castle Case* a hospital ship had been sunk and the U-boat commander attempted to eliminate all traces of the sinking in order to conceal his criminal act altogether.[70] The German Reichsgericht in Leipzig held that the killing of enemies contrary to Art. 23 (c) of the 1907 Hague Regulations or, in similar circumstances, at sea, constitutes an offence against International Law in regard to which the defence of superior orders affords no justification.[71]

In the *von Ruchteschell Trial*, the accused was charged with (i) continuing to fire (on a vessel) after the enemy had indicated his surrender, (ii) sinking enemy merchant vessels without making any provision for the safety of the survivors, (iii) ordering the firing at survivors. The accused was found guilty in one case of (i) and (ii), the charge in (iii) was dropped by the Prosecutor because one witness could not be brought before the court.[72] The central question with regard to (i) was whether there are generally recognized ways of indicating surrender at sea.[73] An analysis of the present law may be found in the San Remo Manual - referring also to that case:

> *"The adversary is obliged to give quarter once it is evident that the vessel wishes to surrender. There is no one agreed method of signalling a wish to surrender, but there are a number of methods that are generally recognized:*
> *- hauling down its flag;*
> *- hoisting a white flag;*
> *- surfacing in the case of submarines;*
> *- stopping engines and responding to the attacker's signals;*
> *- taking to life boats;*

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[68] U.S. Military Commission, UN War Crimes Commission, Law Reports of Trials of War Criminals, vol. III, p. 60.

[69] British Military Court, Hamburg, in: UN War Crimes Commission, Law Reports of Trials of War Criminals, vol. I, p. 2.

[70] UN War Crimes Commission, Law Reports of Trials of War Criminals, vol. I, p. 19.

[71] A.D. 1923-1924, Case No. 235, see Oppenheim, International Law, A Treatise, Vol. II, 7th ed., 1952, p. 338, footnote 3.

[72] British Military Court, Hamburg, in: UN War Crimes Commission, Law Reports of Trials of War Criminals, vol. IX, pp. 82, 85, 86.

[73] *Ibid.*, p. 89.

- at night, stopping the vessel and switching on its lights."[74]

In the *K.-H. Moehle Trial* a British Military Court found that the mere passing of an order that subordinate U-boat commanders were to destroy ships and their crews was a war crime and the accused was found guilty.[75] In his capacity as Korvetten Kapitaen, it fell upon the accused to brief U-boat commanders prior to their going out on operational patrols. Part of his briefing was to acquaint the U-boat commanders with an order originating from the German U-boat Command. This so called "Laconia Order" was in the nature of a standing order which was read regularly to the U-boat commanders. They were never given to them in writing. The order stated:

"(1) No attempt of any kind must be made at rescuing members of ships sunk, and this includes picking up persons in the water and putting them in lifeboats, righting capsized lifeboats and handing over food and water. Rescue runs counter to the rudimentary demands of warfare for the destruction of enemy ships and crews.
(2) Orders for bringing in captains and chief engineers still apply.
(3) Rescue the shipwrecked only if their statements would be of importance for your boat.
(4) Be harsh, having in mind that the enemy has no regard for women and children in his bombing attacks on German cities."[76]

With regard to this specific "Laconia Order", the International Military Tribunal found in another judgment (on Admiral Doenitz) that the order was ambiguous. However, in the Moehle case, the accused removed this ambiguity by commenting on this order when passing it on, and by giving examples which undoubtedly must have given the impression that the policy of the Naval High Command was to kill ship's crews: First, the accused briefed the U-boat commanders not to rescue shipwrecked persons. Then they were told, as an example of why this should be the correct policy, of the case of a commander who was severely reprimanded for not having shot at a raft with five British airmen on it, because *"it was highly probable that the airmen would be rescued by the enemy and would once more go into action"*. The Court found that if survivors were not rescued because it would be dangerous for the U-boat to do so, then it was not illegal. It also found, however, that an order to kill survivors is clearly illegal, and, furthermore that a commander is under a duty to save the lives of the crew if he can. According to the Court, the order the accused passed on, in conjunction with the mentioned example, could be interpreted by a reasonable subordinate only in one way, namely, as an order to kill survivors.[77]

Although this case is cited by some authors as a violation of Art. 23 (c) of the Hague Regulation[78], there is reason to relate the conduct also to Art. 23 (d) of the Hague Regulations (Art. 8 (2) (b) (xii) of the Statute - Declaring that no quarter will be given).

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[74] San Remo Manual on International Law Applicable to Armed Conflicts at Sea, Cambridge University Press, 1995, No. 47.57, p. 135.

[75] British Military Court, Hamburg, in: UN War Crimes Commission, Law Reports of Trials of War Criminals, vol. IX, pp. 75, 78, 80.

[76] *Ibid.*, p. 75.

[77] UN War Crimes Commission, Law Reports of Trials of War Criminals, vol. IX, p. 80.

[78] David, Principes de droit des conflits armés, 2nd ed., Bruxelles, 1999, p. 231.

In this context, based on the above cited case law of the First and Second World War, the San Remo Manual states that attacks on life rafts and life boats of abandoned vessels are prohibited.[79] According to the Commentary[80]

> *"[t]he protection of these vessels against attack is based on the prohibition of attacking the shipwrecked which is a well established rule of customary international law.[81] The duty to protect the shipwrecked applies to all persons;[82] whether military or civilian, who are in danger at sea as a result of misfortune affecting them or the vessel or aircraft[83] carrying them.[84] It is irrelevant that the persons concerned may be fit and therefore possibly in a position to participate in hostilities again, for attacking them would be a war crime.[85] On the other hand this protection ceases if they actually start committing hostile acts again.[86]"*

A more recent indication of the material elements of this offence may be seen in Art. 41 (1) and (2) AP I, since those rules reaffirm Art. 23 (c) of the 1907 Hague Regulations.[87] The provision reads as follows:

> *"1. A person who is recognized or who, in the circumstances, should be recognized to be 'hors de combat' shall not be made the object of attack.*
> *2. A person is 'hors de combat' if:*
> *(a) he is in the power of an adverse Party;*
> *(b) he clearly expresses an intention to surrender; or*
> *(c) he has been rendered unconscious or is otherwise incapacitated by wounds or sickness, and therefore is incapable of defending himself;*
> *provided that in any of these cases he abstains from any hostile act and does not attempt to escape."*

These rules also reaffirm the provisions of the GC and reinforce Part II of AP I, which prohibit attacks directed against the wounded, sick, and shipwrecked (Arts. 12 GC I, 12 GC II) as well as prisoners of war (Arts. 5, 13 GC III). As has been pointed out by Solf, *"[u]nder customary rules, protection from attack begins when the individual has ceased to fight, when*

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[79] San Remo Manual on International Law Applicable to Armed Conflicts at Sea, Cambridge University Press, 1995, No. 47, p. 125.

[80] *Ibid.*, No. 47.58, p. 136.

[81] See the judgments in: *The Llandovery Castle* (German Reichsgericht) 1921, 16 AJIL 708, 1922; *The Peleus Trial* [British Military Court, Hamburg, in: UN War Crimes Commission, Law Reports of Trials of War Criminals], vol. I, p. 1; the trials of *Von Ruechteshell*, [British Military Court, Hamburg, in: UN War Crimes Commission, Law Reports of Trials of War Criminals], vol. IX, p. 82 and *Moehle*, [UN War Crimes Commission, Law Reports of Trials of War Criminals], vol. IX, p. 75. [...] See also GC II Arts. 12 and 18.

[82] GC II Art. 12 indicates that this rule applies to persons that are shipwrecked for any cause and includes forced landings at sea by and from aircraft.

[83] The protection or persons parachuting in distress is codified in Art. 42 of AP I.

[84] AP I Art. 8 (b).

[85] See, for example, the judgment in the case of *Karl-Heinz Moehle* 1946, [UN War Crimes Commission, Law Reports of Trials of War Criminals], vol. IX, p. 75.

[86] AP I Art. 8 (b). The commission of acts of hostility will always deprive a protected vessel of its immunity; see para. 48 (a) and the commentary thereto.

[87] Bothe/Partsch/Solf, New Rules for Victims of Armed Conflicts, Commentary to the AP, Art. 41, p. 219.

his unit has surrendered, or when he is no longer capable of resistance either because he has been overpowered or is weaponless."[88]

Based on this, a specific problem with regard to prisoners of war arose during the negotiations on Art. 41 AP I. It is described in the ICRC Commentary in the following terms:

> *"The essential problem concerned how to create a concrete link between the moment when an enemy soldier is no longer a combatant because he is 'hors de combat', and the moment when he becomes a prisoner of war because he has 'fallen into the power' of his adversary. This precise moment is not always easy to determine exactly. According to the text of 1929 (Article 1), the Convention only applied to persons 'captured' by the enemy, which might have led to the belief that they first should have been taken into custody in order to be protected. The expression adopted in 1949, 'fallen into the power', seems to have a wider scope, but it remains subject to interpretation as regards the precise moment that this event takes place. The central question was to avoid any gap in this protection, whatever interpretation was followed. This question was finally resolved by an overlapping clause: Article 41 prohibits the attack on an enemy 'hors de combat' from the moment that he is rendered 'hors de combat' and with no time-limit, i.e., the provision even protects the prisoner of war whose security is dealt with in the Third Convention. In this way the enemy 'hors de combat' is protected at whatever moment he is considered to have 'fallen into the power' of his adversary.*
> *Article 41 thus purposefully overlaps the Third Geneva Convention. It is a perfect illustration of the interrelation between Hague law and Geneva law."*[89]

With respect to the change of terminology - "killing or wounding" in Art. 23 (c) of the 1907 Hague Regulations and "to be made the object of attack" - in Art. 41 AP I the ICRC Commentary cites a report of the Working Group at the Diplomatic Conference:

> *"this change was designed to make clear that what was forbidden was the deliberate attack against persons 'hors de combat', not merely killing or injuring them as the incidental consequence of attacks not aimed at them 'per se'".*[90]

Therefore, the accidental killing or wounding of such persons, due to their presence among or in proximity to, combatants actually engaged, by fire directed against the latter, is not unlawful.[91]

With regard to the change of "enemy" in Art. 23 (c) of the 1907 Hague Regulations into "person" in Art. 41 AP I the ICRC Commentary presumes:

> *"Perhaps it is because a person 'hors de combat' can no longer be considered as an enemy that the Conference has also abandoned here the terminology of Article 23 (c) of the Hague Regulations in favour of the word "person", suggested during the*

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88 *Ibid.*, pp. 219 *et seq.*
89 De Preux, in: Commentary on the AP, Art. 41, Nos. 1602 *et seq.*, pp. 481 *et seq.*
90 *Ibid.*, no. 1605, p. 482.
91 Bothe/Partsch/Solf, New Rules for Victims of Armed Conflicts, Commentary to the AP, Art. 41, pp. 219 *et seq.*

second session of the Conference of Government Experts. [...] Whatever the reason for this modification, there is no possible ambiguity in Article 41, paragraph 1. The rule protects both regular combatants and those combatants who are considered to be irregular, both those whose status seems unclear and ordinary civilians. There are no exceptions and respect for the rule is also imposed on the civilian population, who should, like the combatants, respect persons 'hors de combat'."[92]

In addition to Art. 41 AP I, Art. 42 AP I is of particular interest. The latter contains a specific provision on parachutists in distress. This rule, which reads as follows:

"1. No person parachuting from an aircraft in distress shall be made the object of attack during his descent.
2. Upon reaching the ground in territory controlled by an adverse Party, a person who has parachuted from an aircraft in distress shall be given an opportunity to surrender before being made the object of attack, unless it is apparent that he is engaging in a hostile act.
3. Airborne troops are not protected by this Article.",

confirms the above cited Back case and covers situations whilst in the air, i.e. incapable of defending or not involved in hostile acts.

N.B.

The British Military Manual defines the term 'at discretion' as contained in Art. 23 (c) of the 1907 Hague Regulations as meaning unconditionally.[93]

bb) Remarks concerning the mental element

In most of the above cited post Second World War Trials "wilfully" constituted the mental element of the crime.[94]

In the *Dreierwalde case* the Court found that no crime would have been committed if the accused could have *"reasonably believed"* that the prisoners of war were trying to escape. A mere *"subjective fear"* of such an escape is not sufficient.[95]

Under AP I there is a difference between Art. 41 (1) and Art. 85 (3) (e). Art. 41 (1) prohibits attacks against *"[a] person **who is recognized or who, in the circumstances, should be recognized to be hors de combat**"* (emphasis added). On the other hand, Art. 85 (3) (e)

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92 *Ibid.*, no. 1606, pp. 482 *et seq.*

93 The Law of War on Land being Part III of the Manual of Military Law, 1958, p. 43.

94 *The Jaluit Atoll case*, U.S. Military Commission, UN War Crimes Commission, Law Reports of Trials of War Criminals, vol. I, p. 72; *P. Back case*, U.S. Military Commission, ibid., vol. III, p. 60; *Schosser, Goldbrunner and Wilm case*, U.S. Military Commission, *ibid.*, p. 65; *K. Meyer case*, Canadian Military Court, *ibid.*, vol. IV, p. 31;

95 See also *inter alia Dreierwalde case*, British Military Court, UN War Crimes Commission, Law Reports of Trials of War Criminals, vol. I, pp. 82, 86.

indicates as a grave breach the fact of *"making a person the object of attack in the knowledge that he is hors de combat"* (emphasis added).

Art. 8 (2) (b) (vii) - Making improper use of a flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury

1. Results from the sources

Material elements

(1) The perpetrator used in violation of international law a flag of truce, the flag or the military insignia or uniform of the enemy or of the United Nations, or the distinctive emblems of the Geneva Conventions.
(2) This conduct resulted in death or serious personal injury.

Mental element

(3) The perpetrator acted wilfully.

2. Commentary

a) Treaty reference of the war crime

The terms "Making improper use of a flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury" are derived to large extent from Art. 23 (f) Hague Regulations as well as Arts. 38, 39 AP I with respect to the perpetrator's conduct and Art. 85 (3) (f) AP I with respect to the result that renders the conduct a grave breach.

According to Art. 23 of the 1907 Hague Regulations

> *"it is especially forbidden [...]*
> *(f) To make improper use of a flag of truce, of the national flag or of the military insignia and uniform of the enemy, as well as the distinctive badges of the Geneva Convention;"*

Art. 38 AP I reads as follows:

> *"1. It is prohibited to make improper use of the distinctive emblem of the red cross, red crescent or red lion and sun or of other emblems, signs or signals provided for by the Conventions or by this Protocol. It is also prohibited to misuse deliberately in an*

armed conflict other internationally recognized protective emblems, signs or signals, including the flag of truce, and the protective emblem of cultural property.
2. It is prohibited to make use of the distinctive emblem of the United Nations, except as authorized by that Organization."

According to Art. 39 AP I

"1. It is prohibited to make use in an armed conflict of the flags or military emblems, insignia or uniforms of neutral or other States not Parties to the conflict.
2. It is prohibited to make use of the flags or military emblems, insignia or uniforms of adverse Parties while engaging in attacks or in order to shield, favour, protect or impede military operations."

Art. 85 (3) AP I reads as follows:

*"3. In addition to the grave breaches defined in Article 11, the following acts shall be regarded as grave breaches of this Protocol, when committed wilfully, in violation of the relevant provisions of this Protocol, **and causing death or serious injury to body or health**: [...]*
(f) the perfidious use, in violation of Article 37, of the distinctive emblem of the red cross, red crescent or red lion and sun or of other protective signs recognized by the Conventions or this Protocol." (emphasis added).

b) Legal basis

Neither the ICTY nor the ICTR has rendered any decision on this war crime to date. However, certain other sources may be helpful in interpreting various elements of this offence.

aa) Remarks concerning the material element

The above-mentioned provisions of AP I may give some indication concerning the material elements. However, there is additional specific customary international law, in particular in the field of naval and air warfare. As Solf correctly points out, *"[w]hether any particular use of an emblem, sign or signal is an 'improper use' will depend not only on the terms of Arts. 37 and 38, but also on international custom and on the provisions of the Convention or Protocol applying to the particular emblem."*[96]

[96] See Bothe/Partsch/Solf, New Rules for Victims of Armed Conflicts, Commentary to the AP, Art. 38, pp. 209 *et seq.* See also Bothe, Flags and Uniforms in War, in: R. Bernhardt (ed.), Encyclopedia of Public International Law, Vol. 2 (1995), p. 403.

(1) Improper use of a flag of truce

Art. 38 AP I reads as follows:

> *"1. [...] It is also prohibited to misuse deliberately in an armed conflict other internationally recognized protective emblems, signs or signals, including the flag of truce, [...]."*

Art. 37 on the Prohibition of perfidy provides:

> *"1. [...] Acts inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence, shall constitute perfidy. The following acts are examples of perfidy:*
> *(a) the feigning of an intent to negotiate under a flag of truce or of a surrender; [...]".*

Comparing these provisions, one might conclude that not every misuse of the flag of truce constitutes perfidy. By choosing the formulation of Art. 23 (f) of the 1907 Hague Regulations and thus referring to improper use, the ICC Statute covers a wider range of prohibited conduct: The prohibition of abuse of flags constitutes an all-embracing prohibition against any abuse of such signs.[97] However, under the ICC Statute, these conducts are only criminal if they result in death or serious personal injury.

Arts. 32-34 of the Hague Regulations contain specific provisions with regard to flags of truce. In particular, they specify that it is a white flag that indicates the desire to enter into communication with the adverse party (and not necessarily surrender). Details on how it is to be used are indicated in these Articles.[98]

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[97] Oeter, in: Fleck (ed.), The Handbook of Humanitarian Law in Armed Conflicts, p. 202 with further references. See also Bothe/Partsch/Solf, New Rules for Victims of Armed Conflicts, Commentary to the AP, Art. 38, p. 209.

[98] Art. 32:

> *"A person is regarded as a parlementaire who has been authorized by one of the belligerents to enter into communication with the other, and who advances bearing a white flag. He has a right to inviolability, as well as the trumpeter, bugler or drummer, the flag-bearer and interpreter who may accompany him."*

Art. 33:

> *"The commander to whom a parlementaire is sent is not in all cases obliged to receive him.*
> *He may take all the necessary steps to prevent the parlementaire taking advantage of his mission to obtain information.*
> *In case of abuse, he has the right to detain the parlementaire temporarily."*

Art. 34:

> *"The parlementaire loses his rights of inviolability if it is proved in a clear and incontestable manner that he has taken advantage of his privileged position to provoke or commit an act of treason."*

In this context, it must be indicated, however, that the use of modern methods of communication could be covered, applying the same ideas *mutadis mutandis*.

N.B.:

- In the German Military Manual it is stated:
  "Misusing the flag of truce constitutes perfidy and is thus a violation of international law (Art. 23 lit. f HagueReg; Art. 37, para. 1 lit. a, Art. 38, para. 1 AP I). The flag of truce is misused, for instance, if soldiers approach an enemy position under the protection of the flag of truce in order to attack."[99]

- The U.S. Military Manual gives also some clarification:
  "Flags of truce must not be used surreptitiously to obtain military information or merely to obtain time to effect a retreat or secure reinforcements or to feign a surrender in order to surprise an enemy."[100]

(2) Improper use of the flag or of the military insignia and uniform of the enemy

With regard to this conduct there are distinct sources dealing specifically with land warfare, naval warfare and air warfare.

(a) Land Warfare

According to Art. 39 AP I

> *"1. It is prohibited to make use in an armed conflict of the flags or military emblems, insignia or uniforms of neutral or other States not Parties to the conflict.*
> *2. It is prohibited to make use of the flags or military emblems, insignia or uniforms of adverse Parties while engaging in attacks or in order to shield, favour, protect or impede military operations.*
> *3. Nothing in this Article or in Article 37, paragraph 1 (d), shall affect the existing generally recognized rules of international law applicable to espionage or to the use of flags in the conduct of armed conflict at sea."*

In contrast to this provision, the crime under the ICC Statute covers only the improper use of the flag or of the military insignia and uniform of the enemy and not of neutral or other States not Parties to the conflict.

In the *O. Skorzeny and Others* case the accused were charged with *"participating in the improper use of American uniforms by entering into combat disguised therewith and treacherously firing upon and killing members of the armed forces of the United States."*[101] All were acquitted. However no legal reasoning has been given.

According to the commentator the Tribunal had to determine whether the wearing of enemy uniforms is or is not a legal ruse of war by distinguishing between the use of enemy uniforms

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99 Joint Services Regulation (ZDv) 15/2, 1992, no. 230.

100 Department of the Army Field Manual, FM 27-10, The Law of Land Warfare, 1956, p. 23.

101 General Military Government Court of the U.S. Zone of Germany, UN War Crimes Commission, Law Reports of Trials of War Criminals, vol. IX, p. 90.

in actual fighting and such use during operations other than actual fighting. He points out that on the use of enemy uniform during actual fighting the law is clear and quotes Lauterpacht: *"As regards the use of the national flag, the military insignia and the uniforms of the enemy, theory and practice are unanimous in prohibiting such use during actual attack and defence since the principle is considered inviolable that during actual fighting belligerent forces ought to be certain who is friend and who is foe."* The Defence, quoting also Lauterpacht, pleaded that the Brigade had instructions to reach their objectives under cover of darkness and in enemy uniforms, but as soon as they were detected, they were to discard their American uniforms and fight under their true colours.[102]

The commentator to this case emphasises that on the use of enemy uniforms other than in actual fighting, the law is uncertain. Some writers at the time held the view that until the actual fighting starts the combatants may use enemy uniforms as a legitimate ruse of war, others thought that the use of enemy uniforms is illegal even before the actual attack. Art. 23 (f) of the 1907 Hague Regulations does not carry the law on the point any further since it does not generally prohibit the use of enemy uniforms, but only the improper use, and leaves the question what uses are proper and what are improper, open.[103]

Since the procedure applicable in this case did not require that the Court makes findings other than those of guilty or not guilty, no safe conclusions can be drawn from the acquittal of all accused. The probable basis for acquittal was that, under the American Manual at the time, they had not violated the law of war in the absence of proof beyond a reasonable doubt, that they had actually opened fire against American troops.[104]

However, this controversy seems to be decided by the rules contained in Art. 39 AP I, which refers to *"engaging in attacks or in order to shield, favour, protect or impede military operations"*.[105] As indicated by the ICRC Commentary *"[t]he prohibition formulated in Article 39, 'while engaging in attacks or in order to shield, favour, protect or impede military operations', includes the preparatory stage to the attack"*.[106] However, it is not clear whether

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[102] *Ibid.*, p. 92.

[103] *Ibid.*, pp. 92 *et seq.*

[104] *Ibid.*, p. 93. See also Bothe/Partsch/Solf, New Rules for Victims of Armed Conflicts, Commentary to the AP, Art. 39, p. 213, Fn. 2.

[105] Bothe, Flags and Uniforms in War, in: R. Bernhardt (ed.), Encyclopedia of Public International Law, Vol. 2 (1995), p. 403.

[106] De Preux, in: Commentary on the AP, Art. 39, No. 1575, p. 467. For a more detailed description of the negotiating history see *ibid.*, Nos. 1573 *et seq.*, pp. 466 *et seq.* (footnotes omitted):

> *"Traditionally the use of the emblems of nationality of the enemy in combat was strictly prohibited by the laws of war. Lieber's code leave no room for doubt in this respect. However, Article 23 (f) of the Hague Regulations of 1907 merely prohibited their "improper use", which left ample room for controversy. The famous Skorzeny case could only further stir up feelings about this issue. The prohibition on "improper use" is not a pure and simple prohibition; it is only a relative prohibition. It requires a definition of the term "improper". The first ICRC draft, presented to the Government Experts in 1972, retained in Article 33 the rule as it had been worded in The Hague, adding that the use of national emblems of the enemy is always forbidden in combat. The experts themselves were divided on this question. Some preferred a pure and simple prohibition, believing that the Hague formula had given rise to excessive misuse. At most, they considered that an exception might be made in situations such as those dealt with in the Third Convention (prisoners of war) and in occupied territory. Others maintained that only the use with the intention of directly facilitating acts of combat should be prohibited. There was a general opinion that there was undoubtedly a reciprocal military advantage in formulating a*

such a conduct is just a violation of international humanitarian law, which seems to be uncontroversial, or whether it amounts to a war crime, as attacking whilst wearing enemy uniform clearly does.

For examples of permitted use and limitations see De Preux, in: Commentary on the AP, Art. 39, No. 1576, pp. 467 *et seq.* and Bothe/Partsch/Solf, New Rules for Victims of Armed Conflicts, Commentary to the AP, Art. 39, p. 214.

In addition, it must be repeated that under the ICC Statute, improper use is only criminal if it results in death or serious personal injury.

N.B.:

- The British Military Manual states on the meaning of "improper" the following:
  "[T]heir employment is forbidden during a combat, that is, the opening of fire whilst in the guise of the enemy. But there is no unanimity as to whether the uniform of the enemy may be worn and his flag displayed for the purpose of approach or withdrawal."[107]

- The U.S. Military Manual indicates the following view:
  National Flags or insignia may be used, what is prohibited is improper use: *"It is certainly forbidden to employ them during combat, but their use at other times is not forbidden."*[108]

(b) Naval Warfare

As it has been indicated above, AP I does not cover the law of naval warfare (Art. 39 (3) AP I). The following rules described in the San Remo Manual reflect the status of customary international law in this field:

"Ruses of war are permitted. Warships and auxiliary vessels, however, are prohibited from launching an attack whilst flying a false flag [...]."[109]

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prohibition. Finally, the draft presented by the ICRC to the Diplomatic Conference proposed the prohibition of the use of the enemy flags, military insignia and uniforms in order to shield, favour or impede military operations (Article 37). The controversy arose again between those who wished to limit the prohibition to attacks, and those who favoured a more restrictive concept. The final wording is a compromise between these two positions in the sense that it responds to the concerns of the former as well as those of the latter.
This text, which covers attacks, i.e., acts of violence committed against the adversary, whether these acts are offensive or defensive (Article 49 - 'Basic rule and field of application', paragraph 1), and all situations directly related to military operations, put an end to the long-standing uncertainty arising from both the imprecise text of The Hague, and from unclear customary law, as well as from the Skorzeny case. However, the fact remains that certain delegations at the Diplomatic Conference considered that any regulation which did not limit itself to attacks would go beyond existing law, although this opinion was not shared by the Conference."

107 The Law of War on Land being Part III of the Manual of Military Law, 1958, p. 103.

108 Department of the Army Field Manual, FM 27-10, The Law of Land Warfare, 1956, p. 23.

109 San Remo Manual on International Law Applicable to Armed Conflicts at Sea, Cambridge University Press, 1995, No. 110, p. 184. The complete rule reads as follows:
"Ruses of war are permitted. Warships and auxiliary vessels, however, are prohibited from launching

N.B.

The U.S. Commander's Handbook on the Law of Naval Operations (NWP 1-14M) states:

> *"Naval surface and subsurface forces may fly enemy colors and display enemy markings to deceive the enemy. Warships must, however, display their true colors prior to an actual armed engagement."*[110]

The German Military Manual indicates:

> *"Ruses of war are permissible also in naval warfare. Unlike land and aerial warfare, naval warfare permits the use of false flags or military emblems (Art. 39, para. 3 AP I). Before opening fire, however, the true flag shall always be displayed."*[111]

(c) Air Warfare

The following sources indicate the law specifically applicable to air warfare:

In the San Remo Manual it is stated:

> *"Military and auxiliary aircraft are prohibited at all times from feigning exempt, civilian or neutral status."*[112]

In the commentary it is pointed out that, contrary to warships, where only the use of a false flag during an attack was prohibited under the traditional law, aircraft have never been entitled to bear false markings.[113]

Art. 19 of the 1923 Hague Rules of Air Warfare drafted by a Commission of Jurists confirms this view:

> *"The use of false external marks is forbidden."*

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an attack whilst flying a false flag and at all times from actively simulating the status of:
(a) hospital ships, small coastal rescue craft or medical transports;
(b) vessels on humanitarian missions;
(c) passenger vessels carrying civilian passengers;
(d) vessels protected by the United Nations flag;
(e) vessels guaranteed safe conduct by prior agreement between the parties, including cartel vessels;
(f) vessels entitled to be identified by the emblem of the red cross or red crescent; or
(g) vessels engaged in transporting cultural property under special protection."

The latter actions by warships which, although they might not necessarily qualify as perfidy are prohibited under the law of armed conflict. It should be noted that in order to commit a violation, the warship must actively endeavour to establish its identity as one of the vessels mentioned under this paragraph. The list of vessels included in this paragraph is exhaustive, *ibid.*, Nos. 110.2 *et seq.*

110 The Commander's Handbook on the Law of Naval Operations (NWP 1-14M), 1995, p. 12-1 (12.5.1).

111 Joint Services Regulation (ZDv) 15/2, 1992, no. 1018.

112 San Remo Manual on International Law Applicable to Armed Conflicts at Sea, Cambridge University Press, 1995, No. 109, p. 184.

113 *Ibid.*, Preliminary remarks, p. 184.

N.B.

The U.S. Commander's Handbook on the Law of Naval Operations (NWP 1-14M) holds the view with regard to neutral flags, insignia, and uniforms that:

> *"Use in combat of false or deceptive markings to disguise belligerent military aircraft as being of neutral nationality is prohibited."*[114]

and with regard to enemy flags, insignia, and uniforms that

> *"The use in combat of enemy marking by belligerent military aircraft is forbidden."*[115]

In a commentary to that rule it is indicted:

> *"This rule may be explained by the fact that an aircraft, once airborne, is generally unable to change its markings prior to actual attack as could a warship. Additionally, the speed with which an aircraft can approach a target (in comparison with warships) would render ineffective any attempt to display true markings at the instant of attack."*[116]

(3) Improper use of the flag or of the military insignia and uniform of the United Nations

Art. 38 AP I reads as follows:

> *"[...]*
> *2. It is prohibited to make use of the distinctive emblem of the United Nations, except as authorized by that Organization."*

Art. 37 AP I on the Prohibition of perfidy specifically states:

> *"1. [...] Acts inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence, shall constitute perfidy. The following acts are examples of perfidy:*
> *(d) the feigning of protected status by the use of signs, emblems or uniforms of the United Nations [...]."*

Comparing these provisions, one might conclude that not every misuse of the flag or of the military insignia and uniform of the United Nations constitutes perfidy. By choosing the formulation of Art. 23 (f) of the 1907 Hague Regulations and thus referring to improper use, the ICC Statute covers a wider range of prohibited conduct: The prohibition of abuse of the flag or of the military insignia and uniform of the United Nations constitutes an all-embracing

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[114] The Commander's Handbook on the Law of Naval Operations (NWP 1-14M), 1995, p. 12-1 (12.3.2).
[115] *Ibid.*, (12.5.2).
[116] Annotated Supplement to the Commander's Handbook on the Law of Naval Operations (NWP 9 (Rev. A)/FMFM 1-10), 1989, p. 12-8, Fn. 14.

prohibition against any abuse of such signs.[117] However, it has to be clarified whether "improper use" is identical with a use not authorized by the UN as mentioned in Art. 38 AP I.

With regard to naval warfare the following rule described in the San Remo Manual reflects customary international law in this field:

> *"[...] Warships and auxiliary vessels, however, are prohibited [...] at all times from actively simulating the status of:*
> *[...]*
> *(d) vessels protected by the United Nations flag; [...]"*[118]

As it has been stated above, under the ICC Statute, these conducts are only criminal if they result in death or serious personal injury.

(4) Improper use of the distinctive emblems of the Geneva Conventions

Art. 38 AP I reads as follows:

> *"1. It is prohibited to make improper use of the distinctive emblem of the red cross, red crescent or red lion and sun or of other emblems, signs or signals provided for by the Conventions or by this Protocol.*
> *[...]."*

In the *H. Hagendorf case* the accused was charged with the *"wrongful use of the Red Cross emblem in a combat zone by firing a weapon at American Soldiers from an enemy ambulance displaying such emblem"*.[119] For the *actus reus* the commentator to this case referred to Art. 23 (f) of the 1907 Hague Regulations. The weapon was used in violation of Arts. 7 and 8 of the 1929 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field.[120] The Court ascertained the improper use of arms by the accused under the shield of the Red Cross insignia. In the following the commentator evaluated the judgement as follows:

> *"It is hard to conceive of a more flagrant misuse than the firing of a weapon from an ambulance by personnel who were themselves protected by such emblems and by the Conventions, in the absence of an attack upon them. This constituted unlawful belligerency, and a criminal course of action.*
> *It should be observed that not every violation of the Conventions concerning the use of the Red Cross insignia would of necessity constitute a punishable act. The need for maintaining a distinction between mere violations of rules of warfare, on the one hand, and war crimes on the other, - the latter being the only ones to entail penal responsibility and sanctions - is urged by authoritative writers, such as Professor*

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[117] See Bothe/Partsch/Solf, New Rules for Victims of Armed Conflicts, Commentary to the AP, Art. 38, p. 209.

[118] San Remo Manual on International Law Applicable to Armed Conflicts at Sea, Cambridge University Press, 1995, No. 110, pp. 184 *et seq.*

[119] U.S. Intermediate Military Government Court at Dachau, UN War Crimes Commission, Law Reports of Trials of War Criminals, vol. XIII, p. 146.

[120] *Ibid.*, p. 147.

Lauterpacht. In the opinion of the learned author war crimes are violations of the laws of war as are criminal in the ordinary and accepted sense of fundamental rules of warfare and of general principles of criminal law by reason of their heinousness, their brutality, their ruthless disregard of the sanctity of human life and personality, or their wanton interference with rights of property unrelated to reasonably conceived requirements of military necessity. [H. Lauterpacht, The Law of Nations and the Punishment of War Crimes, British Year Book of International Law, 1944, pp. 77-78]. Violations not falling within this description would remain outside the sphere of war crimes and consequently of acts liable to penal proceedings."[121]

This reasoning shows that not every misuse of the distinctive emblems of the Geneva Conventions amounts to a war crime, but only the abusive use.

With regard to the law of naval warfare the following rule described in the San Remo Manual reflects customary international law in this field:

"[...] Warships and auxiliary vessels, however, are prohibited [...] at all times from actively simulating the status of:
(a) hospital ships, small coastal rescue craft or medical transports;
(b) vessels on humanitarian missions; [...]
(f) vessels entitled to be identified by the emblem of the red cross or red crescent."[122]

N.B.:

- The U.S. Military Manual gives some clarification on the improper use of distinctive emblem of GC:

  "The following are examples of the improper use of the emblem: Using a hospital or other building accorded such protection as an observation post or military office or depot; firing from a building or tent displaying the emblem of the Red Cross; using a hospital train or airplane to facilitate the escape of combatants; displaying the emblem on vehicles containing ammunition or other nonmedical stores; and in general using it for cloaking acts of hostility".[123]

- With regard to naval warfare the German Military Manual states:

  "[...] it is prohibited to misuse the emblem of the Red Cross or to give a ship, in any other way, the appearance of a hospital ship for the purpose of camouflage. It is also prohibited to make improper use of other distinctive signs equal in status with that of the Red Cross (Art. 45 GC II; Art. 37 AP I) [...]."[124]

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[121] *Ibid.*, p. 148.

[122] San Remo Manual on International Law Applicable to Armed Conflicts at Sea, Cambridge University Press, 1995, No. 110, pp. 184 *et seq.*

[123] Department of the Army Field Manual, FM 27-10, The Law of Land Warfare, 1956, p. 23.

[124] Joint Services Regulation (ZDv) 15/2, 1992, no. 1019.

bb) Remarks concerning the mental element

There seems to be no case law on the mental element of this crime to date. Art. 85 (3) (f) AP I requires a wilful conduct.

Art. 8 (2) (b) (ix) - Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives

1. Results from the sources

Material elements

(1) The perpetrator unlawfully directed attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected.
(2) The objects were not military objectives.

Mental element

(3) The perpetrator acted wilfully.

2. Commentary

a) Treaty reference of the war crime

The terms "Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives" are derived to a large extent from Art. 27 and 56 of the 1907 Hague Regulations and numerous provisions of the GC on the protection of hospitals and places where the sick and wounded are collected.

b) Legal basis

Neither the ICTY nor the ICTR has rendered any decision on this war crime to date. However, certain other sources may be helpful in interpreting various elements of this offence.

aa) Remarks concerning the material element

(1) Attack

The term attack is defined in Art. 49 (1) AP I and *"means acts of violence against the adversary, whether in offence or in defence"*.

As it has been pointed out above, the notion of attack as defined in this provision refers to the use of armed force to carry out a military operation during the course of an armed conflict. Therefore, the terms "offence" and "defence" must be understood independently from the meaning attributed to them by the law regulating the recourse to force under the UN Charter.

(2) Buildings dedicated to religion, education, art, science or charitable purposes, historic monuments

(a) General protection

The ICTY Prosecution defined the elements of the offence "Destruction or wilful damage to institutions dedicated to religion or education" under the ICTY Statute in the following terms:

1. Institutions dedicated to religion or education were destroyed;
[...]
3. The institutions destroyed or wilfully damaged were protected under international humanitarian law; [...][125]

In one post Second World War trial - the *Weizäcker and Others case* - the Military Tribunal referred to Art. 56 (2) of 1907 Hague Regulations:

> *"All seizure of, destruction or wilful damage done to institutions of this character [religious and charitable], historic monuments, works of art and science, is forbidden, and should be made the subject of legal proceedings."*[126]

This general rule, which must be read in connection with Art. 27 of the Hague Regulations:

> *"In sieges and bombardments all necessary steps must be taken to spare, as far as possible, buildings dedicated to religion, art, science, or charitable purposes, historic monuments, hospitals, and places where the sick and wounded are collected, provided they are not being used at the time for military purposes.*
> *It is the duty of the besieged to indicate the presence of such buildings or places by distinctive and visible signs, which shall be notified to the enemy beforehand.",*

is still valid under customary international law. However, a number of rules giving specific protection to specific objects have developed since then.

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[125] ICTY, The Prosecutor's Pre-trial Brief, *The Prosecutor v. Dario Kordic and Mario Cerkez*, IT-95-14/2-PT, p. 49.

[126] U.S. Military Tribunal, A.D., vol. 16, 1949. p. 357.

(b) Specific Protections

- Cultural or religious objects

The following provision of AP I contains specific rules on historic monuments, works of art or places of worship:

> Art 53:
> *"Without prejudice to the provisions of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954, and of other relevant international instruments, it is prohibited:*
> *(a) to commit any acts of hostility directed against the historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples[127];*
> *(b) to use such objects in support of the military effort;*
> *(c) to make such objects the object of reprisals."*

As it is pointed out in the ICRC Commentary to this provision

> *"[t]he protection laid down in this article is accorded "without prejudice" to the provisions of other relevant international instruments. From the beginning of the discussions regarding Article 53 it was agreed that there was no need to revise the existing rules on the subject, but that the protection and respect for cultural objects should be confirmed. It was therefore necessary to state at the beginning of the article that it did not modify the relevant existing instruments. For example, this means that in case of a contradiction between this article and a rule of the 1954 Convention the latter is applicable, though of course only insofar as the Parties concerned are bound by that Convention. If one of the Parties is not bound by the Convention, Article 53 applies. Moreover, Article 53 applies even if all the Parties concerned are bound by another international instrument insofar as it supplements the rules of that instrument.*
> *The Diplomatic Conference adopted Resolution 20, which stresses the fundamental importance of the Hague Convention of 1954, and states that the adoption of Article 53 will not detract from the application of that Convention in any way; moreover, it urges States which have not yet done so to become Parties to it."*[128]

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[127] With regard to the notions *"cultural or spiritual heritage of peoples"* the ICRC Commentary states:
> *"It was stated that the cultural or spiritual heritage covers objects whose value transcends geographical boundaries, and which are unique in character and are intimately associated with the history and culture of a people.*
> *In general the adjective "cultural" applies to historic monuments and works of art, while the adjective "spiritual" applies to places of worship. However, this should not stop a temple from being attributed with a cultural value, or a historic monument or work of art from having a spiritual value. The discussions in the Diplomatic Conference confirmed this. However, whatever the case may be, the expression remains rather subjective. In case of doubt, reference should be made in the first place to the value or veneration ascribed to the object by the people whose heritage it is.*
> *Thus all objects of sufficient artistic or religious importance to constitute the heritage of peoples are protected [...]".*

Wenger, in: Commentary on the AP, Art. 53, Nos. 2064 *et seq.*, p. 646.

[128] Wenger, in: Commentary on the AP, Art. 53, Nos. 2046 *et seq.*, p. 641.

With regard to other instruments, especially the above-cited general rules as contained in the Hague Regulations, the Commentary points out:

> *"Even for States Parties to the Hague Convention of 1954 these provisions remain applicable to cultural property not covered by the more recent Convention [...]".*[129]

Cultural Property

The Hague Convention of 1954 for the Protection of Cultural Property, which defines cultural property in Art. 1 as follows:

> *"For the purposes of the present Convention, the term 'cultural property' shall cover, irrespective of origin or ownership:*
> *(a) movable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art or history, whether religious or secular; archaeological sites; groups of buildings which, as a whole, are of historical or artistic interest; works of art; manuscripts, books and other objects of artistic, historical or archaeological interest; as well as scientific collections and important collections of books or archives or of reproductions of the property defined above;*
> *(b) buildings whose main and effective purpose is to preserve or exhibit the movable cultural property defined in sub-paragraph (a) such as museums, large libraries and depositories of archives, and refuges intended to shelter, in the event of armed conflict, the movable cultural property defined in subparagraph (a);*
> *(c) centres containing a large amount of cultural property as defined in sub-paragraphs (a) and (b), to be known as 'centres containing monuments'.",*

may be a further indication, especially Art. 4 which reads as follows:

> *"1. The High Contracting Parties undertake to respect cultural property situated within their own territory as well as within the territory of other High Contracting Parties by refraining from any use of the property and its immediate surroundings or of the appliances in use for its protection for purposes which are likely to expose it to destruction or damage in the event of armed conflict; and by refraining from any act of hostility directed against such property.*
> *2. The obligations mentioned in paragraph I of the present Article may be waived only in cases where military necessity imperatively requires such a waiver."*

N.B. The recently adopted Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property[130] explains further the latter paragraph as follows:

> *"Article 6 Respect for cultural property*
> *With the goal of ensuring respect for cultural property in accordance with Article 4 of the Convention:*

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[129] *Ibid.*, No. 2060, p. 645.

[130] Second Protocol to the Hague Convention of 1954 on the Protection of Cultural Property in the Event of Armed Conflict adopted on 26 March 1999 (The Hague).

(a) a waiver on the basis of imperative military necessity pursuant to Article 4 paragraph 2 of the Convention may only be invoked to direct an act of hostility against cultural property when and for as long as:

i. that cultural property has, by its function, been made into a military objective; and

ii. there is no feasible alternative available to obtain a similar military advantage to that offered by directing an act of hostility against that objective;

(b) a waiver on the basis of imperative military necessity pursuant to Article 4 paragraph 2 of the Convention may only be invoked to use cultural property for purposes which are likely to expose it to destruction or damage when and for as long as no choice is possible between such use of the cultural property and another feasible method for obtaining a similar military advantage;

[...]."

A special case is dealt with in Article 12:

"Immunity of cultural property under enhanced protection
The Parties to a conflict shall ensure the immunity of cultural property under enhanced protection by refraining from making such property the object of attack from any use of the property or its immediate surroundings in support of military action."

The AP I and the Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property contain specific criminality clauses:

Art. 85 (4) (d) AP I states that

"making the clearly recognized historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples and to which special protection has been given by special arrangement, for example, within the framework of a competent international organization, the object of attack, causing as a result extensive destruction thereof, where there is no evidence of the violation by the adverse Party of Article 53, sub-paragraph (b) [to use such objects in support of the military actions], and when such historic monuments, works of art and places of worship are not located in the immediate proximity of military objectives"

is a grave breach. Thereby, it goes beyond the requirements of the "normal" war crime derived from the Hague Regulations, making it a particularly serious war crime.

Art. 15 (1) of the Second Protocol to the Hague Convention of 1954 on the Protection of Cultural Property defines serious violations of this Protocol as follows:

"1. Any person commits an offence within the meaning of this Protocol if that person intentionally and in violation of the Convention or this Protocol commits any of the following acts:

a) making cultural property under enhanced protection the object of attack;

b) using cultural property under enhanced protection or its immediate surroundings in support of military action;
c) extensive destruction or appropriation of cultural property protected under the Convention and this Protocol;
d) making cultural property protected under the Convention and this Protocol the object of attack;
e) theft, pillage or misappropriation of, or acts of vandalism directed against cultural property protected under the Convention."

Paras. (a)-(c) are in effect defined as grave breaches as they result in mandatory universal jurisdiction (see Art. 16 (1) of the Protocol). Paras. (b) and (c) were seen by negotiators as new treaty rules, while para. (a) reflects Art. 85 (4) AP I. Paras (d) and (e) were drafted as normal war crimes, reflecting existing customary international law.

Religious objects

Religious objects may fall under the above-cited protections defined in AP I or the Hague Convention of 1954 on the Protection of Cultural Property if they *constitute the cultural or spiritual heritage of peoples* (AP I) or fulfil the conditions set forth in Art. 1 of the Hague Conventions. However, it has to be indicated that they remain protected under customary international law without these additional qualifications in accordance with the general rules derived from the Hague Regulations.

Objects dedicated to education and science

These objects may also fall under the above-cited protections defined in AP I or the Hague Convention of 1954 on the Protection of Cultural Property if they *constitute the cultural or spiritual heritage of peoples* (AP I) or fulfil the conditions set forth in Art. 1 of the 1954 Hague Convention. However, if they do not fall under those definitions, they are protected under customary international law in accordance with the general rules derived from the Hague Regulations and the rules on the protection of civilian objects.

(3) Hospitals and places where the sick and wounded are collected

- Rules according protection for hospitals and places where the sick and wounded are collected (rules on hospital ships and aircraft are included on the assumption that the ordinary meaning of the term "place" could cover those objects)

  Art. 19 GC I
  "Fixed establishments and mobile medical units of the Medical Service may in no circumstances be attacked, but shall at all times be respected and protected by the Parties to the conflict. [...]"[131]

[131] See also Art. 21 AP I.

Art. 20 GC I:

"Hospital ships entitled to the protection of the Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949, shall not be attacked from the land."

Art. 21 GC I:

"The protection to which fixed establishments and mobile medical units of the Medical Service are entitled shall not cease unless they are used to commit, outside their humanitarian duties, acts harmful to the enemy. Protection may, however, cease only after a due warning has been given, naming, in all appropriate cases, a reasonable time limit, and after such warning has remained unheeded."

Art. 22 GC I:

"The following conditions shall not be considered as depriving a medical unit or establishment of the protection guaranteed by Article 19:

(1) That the personnel of the unit or establishment are armed, and that they use the arms in their own defence, or in that of the wounded and sick in their charge.

(2) That in the absence of armed orderlies, the unit or establishment is protected by a picket or by sentries or by an escort.

(3) That small arms and ammunition taken from the wounded and sick and not yet handed to the proper service, are found in the unit or establishment.

(4) That personnel and material of the veterinary service are found in the unit or establishment, without forming an integral part thereof.

(5) That the humanitarian activities of medical units and establishments or of their personnel extend to the care of civilian wounded or sick."

Art. 23 GC I:

"In time of peace, the High Contracting Parties and, after the outbreak of hostilities, the Parties thereto, may establish in their own territory and, if the need arises, in occupied areas, hospital zones and localities so organized as to protect the wounded and sick from the effects of war, [...]."

Upon the outbreak and during the course of hostilities, the Parties concerned may conclude agreements on mutual recognition of the hospital zones and localities they have created. They may for this purpose implement the provisions of the Draft Agreement annexed to the present Convention,[132] with such amendments as they may consider necessary."

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[132] Annex I. Draft Agreement Relating to Hospital Zones and Localities:

Art. 11:

"In no circumstances may hospital zones be the object of attack. They shall be protected and respected at all times by the Parties to the conflict."

Art. 4:

"Hospital zones shall fulfil the following conditions:

(a) They shall comprise only a small part of the territory governed by the Power which has established them.

(b) They shall be thinly populated in relation to the possibilities of accommodation.

(c) They shall be far removed and free from all military objectives, or large industrial or administrative establishments.

(d) They shall not be situated in areas which, according to every probability, may become important for the conduct of the war."

Art. 5:

Art. 14 GC IV and Annex I to that Convention establish a similar regime for hospital and safety zones and localities.

Art. 22 GC II:
"Military hospital ships, that is to say, ships built or equipped by the Powers specially and solely with a view to assisting the wounded, sick and shipwrecked, to treating them and to transporting them, may in no circumstances be attacked [...], on condition that their names and descriptions have been notified to the Parties to the conflict ten days before those ships are employed."[133]

Art. 23 GC II:
"Establishments ashore entitled to the protection of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of August 12, 1949 shall be protected from bombardment or attack from the sea."

Art. 34 GC II:
"The protection to which hospital ships and sick-bays are entitled shall not cease unless they are used to commit, outside their humanitarian duties, acts harmful to the enemy. Protection may, however, cease only after due warning has been given, naming in all appropriate cases a reasonable time limit, and after such warning has remained unheeded. [...]"

Art. 35 GC II:
The following conditions shall not be considered as depriving hospital ships or sick-bays of vessels of the protection due to them:
(1) The fact that the crews of ships or sick-bays are armed for the maintenance of order, for their own defence or that of the sick and wounded.
(2) The presence on board of apparatus exclusively intended to facilitate navigation or communication.
(3) The discovery on board hospital ships or in sick-bays of portable arms and ammunition taken from the wounded, sick and shipwrecked and not yet handed to the proper service.
(4) The fact that the humanitarian activities of hospital ships and sick-bays of vessels or of the crews extend to the care of wounded, sick or shipwrecked civilians.
(5) The transport of equipment and of personnel intended exclusively for medical duties, over and above the normal requirements.

Art. 18 GC IV:
"Civilian hospitals organized to give care to the wounded and sick, the infirm and maternity cases, may in no circumstances be the object of attack but shall at all times be respected and protected by the Parties to the conflict."[134]

"Hospital zones shall be subject to the following obligations:
(a) The lines of communication and means of transport which they possess shall not be used for the transport of military personnel or material, even in transit.
(b) They shall in no case be defended by military means."

[133] Arts. 24-27 give similar protection to other types of hospital ships, their lifeboats and to the coastal rescue craft.

[134] See also Art. 56 (2) GC IV.

Art. 19 GC IV:

"The protection to which civilian hospitals are entitled shall not cease unless they are used to commit, outside their humanitarian duties, acts harmful to the enemy. Protection may, however, cease only after due warning has been given, naming, in all appropriate cases, a reasonable time limit and after such warning has remained unheeded.

The fact that sick or wounded members of the armed forces are nursed in these hospitals, or the presence of small arms and ammunition taken from such combatants and not yet been handed to the proper service, shall not be considered to be acts harmful to the enemy."

Art. 12 AP I - Protection of medical units[135]

"1. Medical units shall be respected and protected at all times and shall not be the object of attack.

2. Paragraph 1 shall apply to civilian medical units, provided that they:

(a) belong to one of the Parties to the conflict;

(b) are recognized and authorized by the competent authority of one of the Parties to the conflict; or

(c) are authorized in conformity with Article 9, paragraph 2, of this Protocol or Article 27 of the First Convention.

3. The Parties to the conflict are invited to notify each other of the location of their fixed medical units. The absence of such notification shall not exempt any of the Parties from the obligation to comply with the provisions of paragraph 1.

4. Under no circumstances shall medical units be used in an attempt to shield military objectives from attack. Whenever possible, the Parties to the conflict shall ensure that medical units are so sited that attacks against military objectives do not imperil their safety."

Art. 13 AP I - Discontinuance of protection of civilian medical units

"1. The protection to which civilian medical units are entitled shall not cease unless they are used to commit, outside their humanitarian function, acts harmful to the enemy. Protection may, however, cease only after a warning has been given setting, whenever appropriate, a reasonable time-limit, and after such warning has remained unheeded.

2. The following shall not be considered as acts harmful to the enemy:

(a) that the personnel of the unit are equipped with light individual weapons for their own defence or for that of the wounded and sick in their charge;

(b) that the unit is guarded by a picket or by sentries or by an escort;

(c) that small arms and ammunition taken from the wounded and sick, and not yet handed to the proper service, are found in the units;

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[135] Art. 9 (5) AP I contains the following definition: *"'Medical units' means establishments and other units, whether military or civilian, organized for medical purposes, namely the search for, collection, transportation, diagnosis or treatment - including first-aid treatment - of the wounded, sick and shipwrecked, or for the prevention of disease. The term includes for example, hospitals and other similar units, blood transfusion centres, preventive medicine centres and institutes, medical depots and the medical and pharmaceutical stores of such units. Medical units may be fixed or mobile, permanent or temporary".* The principal aim of Art. 12 AP I is to extend to all civilian medical units the protection which hitherto applied to all military medical units on the one hand (cf. Art. 19 GC I), but only to civilian hospitals on the other (cf. Art. 18 GC IV).

(d) that members of the armed forces or other combatants are in the unit for medical reasons."

Arts. 24-31 AP I contain the modern law on the protection of medical aircraft.

In one post Second World War trial - the *Kurt Student case* - the accused was charged with bombing *"a hospital which was marked with a Red Cross".*[136] According to the commentator of the WCC the acts alleged by the charges were clear breaches of international law. Since the Tribunal never specifically quoted the precise provisions violated, the commentator set out the relevant articles of the 1929 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field: Art. 6, 9, 19, 20, 22.[137] Especially Art. 6 describes the *actus reus*: *"Mobile medical formations, that is to say, those which are intended to accompany armies in the field, and the fixed establishments of the medical service shall be respected and protected by the belligerents."*

(4) Loss of protection

The above-mentioned objects are only protected provided they are not military objectives as they are defined in Art. 52 (2) AP I (see section Art. 8 (2) (b) (v) - Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives).

Moreover, as provided for in Art. 52 (3) AP I

"In case of doubt whether an object which is normally dedicated to civilian purposes, such as a place of worship, a house or other dwelling or a school, is being used to make an effective contribution to military action, it shall be presumed not to be so used."

However, it should be noted that in relation to medical and cultural objects precise indications are given as to when those objects lose their protection,[138] and further conditions are stipulated before they may be attacked.[139]

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[136] British Military Court, UN War Crimes Commission, Law Reports of Trials of War Criminals, vol. IV, p. 118.

[137] *Ibid.*, pp. 120 *et seq.*

[138] For cultural property see Art. 4 (2) of the 1954 Hague Convention in connection with Art. 6 (a) and (b) of the Second Protocol thereto and Art. 13 of that Protocol; for hospitals and places where the sick and wounded are collected see Arts. 21 1st sentence, 22 GC I; 34 1st sentence, 35 GC II; 19 (1) 1st sentence and (2) GC IV, 13 (1) 1st sentence and (2) AP I. With regard to hospital ships see also San Remo Manual on International Law Applicable to Armed Conflicts at Sea, Cambridge University Press, 1995, Nos. 48, 49, pp. 136-139. With regard to medical aircraft see also San Remo Manual on International Law Applicable to Armed Conflicts at Sea, Cambridge University Press, 1995, Nos. 54, 57, 58, pp. 143-146.

[139] For cultural property see Art. 4 (2) of the 1954 Hague Convention in connection with Art. 6 (c) and (d) of the Second Protocol thereto and Art. 13 of that Protocol; for hospitals and places where the sick and wounded are collected see Arts. 21 2nd sentence GC I; 34 2nd sentence GC II; 19 (1) 2nd sentence GC IV, 13 (1) 2nd sentence AP I. With regard to hospital ships see also San Remo Manual on International Law Applicable to Armed Conflicts at Sea, Cambridge University Press, 1995, Nos. 50, 51, pp. 139-141.

bb) Remarks concerning the mental element

The ICTY Prosecution defined the mental element of the offence "Destruction or wilful damage to institutions dedicated to religion or education" in the following terms:

- The destruction or damage was committed wilfully[140].[141]

Thus, it seems that there are no specific requirements for the mental element besides those already contained in Art. 30 of the ICC Statute.

Art. 8 (2) (b) (xi) - Killing or wounding treacherously individuals belonging to the hostile nation or army

1. Results from the sources

Material elements

(1) The perpetrator killed or injured [or captured] a person belonging to the adverse party.
(2) The act in question was of a nature to cause or at least to induce the confidence of that person.
(3) The confidence was based on a legal protection prescribed by rules of international law applicable in armed conflict, which that person himself is entitled to or which he is obliged to accord.

Mental element

(4) The perpetrator acted wilfully and with the specific intent to kill or injure [or capture] by means of the betrayal of confidence.

2. Commentary

a) Treaty reference of the war crime

The terms "Killing or wounding treacherously individuals belonging to the hostile nation or army" are directly derived from Art. 23 (b) of the Hague Regulations.

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[140] In the *Simic and others case* the ICTY Prosecution defined the notion of "wilful" as *"a form of intent which includes recklessness but excludes ordinary negligence. 'Wilful' means a positive intent to do something, which can be inferred if the consequences were foreseeable, while 'recklessness' means wilful neglect that reaches the level of gross criminal negligence."*, ICTY, The Prosecutor's Pre-trial Brief, *The Prosecutor v. Milan Simic, Miroslav Tadic, Stevan Todorovic, Simo Zaric*, IT-95-9-PT, p. 35.

[141] ICTY, The Prosecutor's Pre-trial Brief, *The Prosecutor v. Dario Kordic and Mario Cerkez*, IT-95-14/2-PT, p. 49.

b) Legal basis

Neither the ICTY nor the ICTR has rendered any decision on this war crime to date. However, certain other sources may be helpful in interpreting various elements of this offence.

aa) Remarks concerning the material element

The scope of this offence is not very clear. Art. 23 (b) of the Hague Regulations, which is derived from the customary law prohibition of perfidy,[142] does not contain a definition of treacherous conduct. Examples mentioned by Oppenheim are the following:

> *"no assassin must be hired, and no assassination of combatants be committed; a price may not be put on the head of an enemy individual; proscription and outlawing are prohibited; no treacherous request for quarter must be made; no treacherous simulation of sickness or wounds is permitted."*[143]

Greenspan cites the following:

> *"acts of assassination, the hiring of assassins, putting a price on an enemy's head, offering a reward for an enemy 'dead or alive', proscription and outlawry of an enemy, treacherous request for quarter, and the treacherous simulation of death, wounds, or sickness, or pretended surrender, for the purpose of putting the enemy off his guard and then attacking him."*[144]

N.B.

- The U.S. Air Force Pamphlet 110-31 states:

  "Assassination. Article 23 (b) HR [...] has been construed as prohibiting assassination, proscription or outlawry of an enemy, or putting a price upon an enemy's head, as well as offering a reward for any enemy 'dead or alive'. Obviously it does not preclude lawful attacks by lawful combatants on individual soldiers or officers of the enemy."[145]

- The U.S. Field Manual and the Australian Military Manual state with regard to the prohibition of perfidy:

  "[This means] prohibiting assassination, proscription, or outlawry of an enemy, or putting a price upon an enemy's head, as well as offering a reward for an enemy's head, as well as offering a reward for an enemy dead or alive."[146]

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142 See Bothe/Partsch/Solf, New Rules for Victims of Armed Conflicts, Commentary to the AP, Art. 37, p. 203.

143 Oppenheim, International Law, A Treatise, Vol. II, 7th ed., 1952, p. 342.

144 Greenspan, The Modern Law of Land Warfare, 1959, p. 317.

145 Department of the Air Force, AF Pamphlet 110-31, International Law - The Conduct of Armed Conflict and Air Operations, 1976, p. 5-12.

146 Department of the Army Field Manual, FM 27-10, The Law of Land Warfare, 1956, p. 17; Australian

- The British Military Manual, indicating that ruses are not forbidden gives the following examples for treacherous conduct:

> *"For instance, it would be treachery for a soldier to sham wounded or dead and then to attack enemy soldiers who approached him without hostile intent, or to pretend that he had surrendered and afterwards to open fire upon or attack an enemy who was treating him as hors de combat or a prisoner."*[147]

The objectives of the negotiations leading to AP I were to reaffirm the prohibitions of perfidy of the Hague Regulations, as unambiguously as possible, to define perfidy using objective and understandable criteria, and to illustrate examples of prohibited perfidy in order to further clarify the definition and to distinguish perfidy from permissible ruses by defining ruses and providing illustrative examples.[148]

The result was Art. 37 AP I according to which

> *"1. It is prohibited to kill, injure or capture an adversary by resort to perfidy. Acts inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence, shall constitute perfidy. The following acts are examples of perfidy:*
> *(a) the feigning of an intent to negotiate under a flag of truce or of a surrender;*
> *(b) the feigning of an incapacitation by wounds or sickness;*
> *(c) the feigning of civilian, non-combatant status; and*
> *(d) the feigning of protected status by the use of signs, emblems or uniforms of the United Nations or of neutral or other States not Parties to the conflict.*
> *2. Ruses of war are not prohibited. Such ruses are acts which are intended to mislead an adversary or to induce him to act recklessly but which infringe no rule of international law applicable in armed conflict and which are not perfidious because they do not invite the confidence of an adversary with respect to protection under that law. The following are examples of such ruses: the use of camouflage, decoys, mock operations and misinformation."*

In the first sentence, Para. 1 reaffirms the explicit prohibition of Art. 23 (b) of the Hague Regulations against the perfidious killing or wounding of adversaries. However, it extends the prohibition to the capture of the enemy as result of the perfidious conduct. Destruction of property as a consequence of such conduct is not prohibited in both rules. Considering the examples given above constituting perfidy under Art. 23 (b) of the Hague Regulations it becomes obvious that Art. 37 AP I contains a narrower prohibition. The different forms of conduct summarized under the term assassination in the U.S. Air Force Pamphlet and recognized in the literature are not covered by Art. 37 AP I, since such an act would not involve any reliance by the victim on confidence that international law protects him.

Defence Force, Operation Series, Commanders' Guide, ADFP 37 Suppl. 1, pp. 5-3 and 9-4.

[147] The Law of War on Land being Part III of the Manual of Military Law, 1958, p. 42.

[148] Bothe/Partsch/Solf, New Rules for Victims of Armed Conflicts, Commentary to the AP, Art. 37, p. 203 with further references in Fn. 10.

The consequence for the traditional rule as formulated in the Hague Regulations is not clear. Ipsen, for example, concludes:

> *"The fact that Art. 37 has been accepted by the vast majority of States indicates that there is no customary international law prohibition of perfidy with a wider scope than that of Art. 37."*[149]

Apart from problematic field of assassinations, it seems to be uncontroversial that perfidious acts are constituted by two elements: Firstly, the act in question must objectively be of a nature to cause or at least to induce the confidence of an adversary. This confidence must be created because of a precisely specified legal protection which either the adversary himself is entitled to or is a protection which he is legally obliged to accord to the adversary. As pointed out by Art. 37 AP I, this protection must be prescribed by rules of international law applicable in armed conflict. Secondly, the definition contains a subjective element. The act inviting confidence must be carried out intentionally in order to mislead the adversary into relying upon the protection he expects.[150] With respect to this "intent to betray" confidence, the Report of the Diplomatic Conference states that:

> *"the requisite intent would be an intent to kill, injure or capture by means of the betrayal of confidence".*[151]

Examples of perfidious conduct are given in the third sentence of Para. 1. This list is illustrative only. The report of the Committee at the Diplomatic Conference indicated that it selected a short list of particularly clear examples and that it deliberately avoided debatable or borderline cases.[152]

The wording of Art. 37 AP I leaves the question open whether the scope of the prohibition is restricted only to accomplished acts, or whether it is extended to acts committed against an adversary with intent to kill, injure or capture him, but which do not achieve any of these results.[153] However, the wording of Art. 23 (b) of the Hague Regulation which is the basis of this war crime under the Statute seems to require death or injury as the result of the conduct.

Para. 2 of Art. 37 AP I states that ruses of war are permissible, defines ruses and provides illustrative examples. Ruses of war are essentially distinguished from perfidious acts *in so far as they do not invite the confidence of an adversary with respect to protection under international law applicable in armed conflicts.*

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149 Ipsen, Perfidy, in: R. Bernhardt (ed.), Encyclopedia of Public International Law, Vol. 3 (1997), p. 980.

150 Bothe/Partsch/Solf, New Rules for Victims of Armed Conflicts, Commentary to the AP, Art. 37, pp. 204 et seq.; Ipsen, Perfidy, in: R. Bernhardt (ed.), Encyclopedia of Public International Law, Vol. 3 (1997), p. 978.

151 Official Records, Vol. XV, CDDH/236/Rev. 1, para. 16.

152 Official Records, Vol. XV, CDDH/236/Rev. 1, para. 15.

153 See Ipsen, Perfidy, in: R. Bernhardt (ed.), Encyclopedia of Public International Law, Vol. 3 (1997), p. 980.

N.B.

- The U.S. Air Force Pamphlet 110-31 defines:

"Perfidy or treachery involves acts inviting the confidence of the adversary that he is entitled to protection or is obliged to accord protection under international law, combined with intent to betray that confidence. Such acts include the following:
(i) the feigning of a situation of distress, notably through the misuse of an internationally recognized sign;
(ii) feigning of a cease-fire, a humanitarian negotiation or surrender;
and (iii) the feigning by combatants of civilian, noncombatant status."[154]

- A specific description of prohibited perfidy in naval warfare is given in the San Remo Manual:

"Perfidy is prohibited. Acts inviting the confidence of an adversary to lead it to believe that it is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, with the intent to betray that confidence, constitute perfidy. Perfidious acts include the launching of an attack while feigning:
(a) exempt, civilian, neutral or protected United Nations status;
(b) surrender or distress by, e.g., sending a distress signal or by the crew taking to life rafts."[155]

The Commentary thereto explains:

"The crucial element in the examples listed is that while protected status is simulated by a warship or military aircraft, an act of hostility is prepared and executed."[156]

bb) Remarks concerning the mental element

There seems to be no case law on the mental element of this crime to date. However, reference must be made to the explanations under section aa) on the constituent elements of the definition of perfidy dealing with the necessary intent.

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[154] Department of the Air Force, AF Pamphlet 110-31, International Law - The Conduct of Armed Conflict and Air Operations, 1976, p. 5-12.

[155] San Remo Manual on International Law Applicable to Armed Conflicts at Sea, Cambridge University Press, 1995, No. 111, p. 186.

[156] *Ibid.*, No. 111.2, p. 186.

Art. 8 (2) (b) (xii) - Declaring that no quarter will be given

1. Results from the sources

Material elements

(1) The perpetrator ordered that there shall be no survivors, [or threatened an adversary therewith] or conducted hostilities on this basis.

Mental element

(2) The perpetrator acted wilfully.

2. Commentary

a) Treaty reference of the war crime

The phrase "Declaring that no quarter will be given" is directly derived from Art. 23 (d) Hague Regulations (Art. 40 AP I reaffirms this rule by using a more modern language, and extends its scope explicitly to the threat that no quarter will be given: *"It is prohibited to order that there shall be no survivors, to threaten an adversary therewith or to conduct hostilities on this basis."*[157]).

b) Legal basis

Neither the ICTY nor the ICTR has rendered any decision on this war crime to date. However, certain other sources may be helpful in interpreting various elements of this offence.

aa) Remarks concerning the material element

The prohibition of refusing quarter is a very long-standing customary rule and is directly linked with the crime under 8 (2) (b) (vi) of the Statute. It constitutes in essence a logical expression of the principle that the legal use of military violence is strictly limited to what is required by military necessity. Only for so long as the enemy combatant participates in hostilities is he to be considered as a valid target of attack. Even without the specific provision of Art. 40 AP I (Art. 23 (d) of the 1907 Hague Regulations), attacks on those *hors de combat* would thus have been regarded as unlawful acts under Art. 41 AP I.[158] The only addition in Art. 23 (d) Hague Regulations or Art. 40 AP I is that not only the commission of the acts, but also the order or threat, amounts to a war crime.

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[157] De Preux, in: Commentary on the AP, Art. 40, No. 1594, pp. 475 *et seq.*; Bothe/Partsch/Solf, New Rules for Victims of Armed Conflicts, Commentary to the AP, Art. 40, p. 216.

[158] De Preux, in: Commentary on the AP, Art. 40, No. 1591, p. 475.

Because of the overlap between Arts. 23 (c) of the Hague Regulations (Art. 41 AP I) and 23 (d) of the Hague Regulations (Art. 40 AP I), the cases cited under the section Art. 8 (2) (b) (vi) - Killing or wounding a combatant who, having laid down his arms or having no longer means of defence, has surrendered at discretion have to be taken into account.

In addition to those judgments, the *Karl Strenger and Benno Crusius case*[159] from after the First World War is of some interest: One accused was charged with having issued an order to the effect that all prisoners and wounded were to be killed. The alleged orders were:

> *"No prisoners are to be taken from to-day onwards; all prisoners, wounded or not, are to be killed,"* and
> *"All the prisoners are to massacred; the wounded, armed or not, are to be massacred; even men captured in large organised units are to be massacred. No enemy must remain alive behind us."*[160]

The accused was acquitted because it could not be proved that he gave this order.[161]

Beyond the issue of the killing of individuals who surrender, an additional specific problem appears in the context of the conduct of hostilities, namely the question, whether the making of surrender impossible by choosing particular methods or means of warfare amounts to a refusal of quarter.

bb) Remarks concerning the mental element

There seems to be no case law on the mental element of this crime to date.

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[159] *Karl Strenger and Benno Crusius case*, in: Claud Mullins, The Leipzig Trials, London, 1921, pp. 151 *et seq.*

[160] *Ibid.*, p. 152.

[161] *Ibid.*, p. 159.